EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 560.

JOHN BUDZISZ AND AUGUST BUDZISZ, ALIAS ANASTAZIUS BUDZISZ, PLAINTIFFS IN ERROR,

vs.

ILLINOIS STEEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

RECORD FILED JANUARY 7, 1898.

(16,773.)

(16,773.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 560.

JOHN BUDZISZ AND AUGUST BUDZISZ, ALIAS ANASTAZIUS BUDZISZ, PLAINTIFFS IN ERROR,

vs.

ILLINOIS STEEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

INDEX.

	Page.
Complaint	1
Answer	2
Amended answer	13
Order striking out parts of answer, &c	15
Second amended answer	15
Order striking out amended answer and parts of second amended answer	21
Exceptions to orders striking parts of answers, &c	21
Judgment	22
Assignment of errors	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1898.

therein stated upon information and belief, and as to these matters he believes them to be true.

JAMES H. PRICE.

Subscribed and sworn to before me this 21st day of February, A. D. 1896.

JOHN H. PAUL,
Notary Public, Milwaukee Co., Wis.

(Endorsed:) Filed February 26, 1896. Ed W. Kurtz, clerk.

* * * * * * *

United States Circuit Court, Eastern District of Wisconsin.

ILLINOIS STEEL COMPANY, Plaintiff,
vs.
JOHN BUDZISZ (alias) and AUGUST BUDZISZ (alias), Defendants.

And now come the defendants, John Budzisz and August Budzisz, alias Anastazius Budzisz, by Rublee A. Cole, their attorney, and, for their answer to the plaintiff's complaint herein, allege and show to the court:

First. That as a plea in abatement herein and as facts which do not appear upon the face of the complaint, which show that the plaintiff has not legal capacity to sue, and as a plea to the jurisdiction of the court, the defendants allege and show to the court—

That the defendants deny each and every allegation in plaintiff's complaint contained not hereinafter specifically admitted, stated, or denied; and the defendants specifically deny that the plaintiff is a corporation, and specifically deny that the plaintiff is duly organized and existing under and by virtue of the laws of the State of Illinois as a corporation, and further specifically deny that the plaintiff is authorized to hold, possess, and occupy real estate within the State of Wisconsin; and the defendants specifically deny that the plaintiff ever was seized in fee-simple absolute of the premises described in the complaint, and the defendants specifically deny that the plaintiff now is seized in fee-simple absolute of the premises described in the complaint; and the defendants specifically deny that the plaintiff is entitled to the immediate possession of the premises described in the complaint; and the defendants allege that the plaintiff never used the premises set forth in the complaint in the conduct of its business, and further allege that the said premises have never been necessary for the use of the plaintiff in the conduct of its business, and never will become necessary for the use of the plaintiff in the conduct of its business; and the defendants further allege that the plaintiff is an unlawful trust and monopoly and conspiracy in restraint of trade and commerce among the several States and in restraint of trade between the State of Illinois and the State of Wisconsin, and its pretended articles of consolidation and creation are illegal and in violation of the laws of the State of Illinois and of the United States and of the act entitled "An act to protect trade and commerce against unlawful restraints and mo-

nopolies," which was enacted on the second day of July, 1890, by the Congress of the United States and approved by the President July 2nd, 1890.

And the defendants further allege that on, to wit, the 1st day of January, A. D. 1889, at and within the county of Cook and State of Illinois, there was existing a certain corporation and body politic known and styled "The North Chicago Rolling Mill Company;" that said North Chicago Rolling Mill Company was incorporated by and under the provisions of an act of the General Assembly of the State of Illinois, which said act was approved on the 9th day of March, A. D. 1869; that the capital stock of the said company was fixed at one million dollars, divided into shares of one hundred dollars each, with power to said company to increase said capital stock to three millions of dollars; that the powers conferred upon said company were "to carry on the business of smelting, rolling, or otherwise working iron and other metals, and for that purpose may erect or purchase all such buildings, mills, furnaces, machinery, structures, and materials as shall be necessary or incident to said business, either in the city of Chicago or elsewhere, and, for the purpose of its said business, may acquire and hold all necessary real estate, and may sell, convey, or mortgage the same, as its board of directors shall think proper."

That said act conferred upon said corporation the further right and power to purchase the property of the Chicago Rolling Mill Company, on the north branch of the Chicago river, and pay for the same in stock of the company created by said act, and — the event of such purchase to maintain and operate the railroad tracks existing at the time said act was passed by said General Assembly, and which said tracks connected the works of said company with the tracks of the Chicago and Northwestern Railroad Company.

That thereafter the North Chicago Rolling Mill Company, pursuant to the power conferred upon it by said act of the General Assembly, purchased the property of the Chicago Rolling Mill Company and paid for the same in its stocks.

That on said 1st day of January, A. D. 1889, there was existing in said Cook county, Illinois, a corporation and body politic named the Union Steel Company; that said corporation was organized under an act of the General Assembly of the State of Illinois entitled "An act concerning corporations," approved April 18th, 1872, and in force July 1st, A. D. 1872, and all acts amendatory thereof; that the object for which said corporation was formed, as set forth in the application for license to open books for subscriptions to the stock of said company, was "to mine and purchase iron ore; to manufacture, sell, and generally deal in iron and steel, iron and steel ingots, blooms, railroad rails, billets, bars, plate, wire rod; plain, bright, and galvanized wire; railroad frogs, switches, and crossings, and all other kinds of manufactured iron and steel;" that the capital stock of said company was fixed at four million six hundred thousand dollars, and the location of the principal office at Chicago, Cook county, Illinois; that Marvin A. Farr, Charles L. Hilliard, and James W. Ferry were appointed commissioners to open books

for subscription to the capital stock of said company, and thereafter said commissioners reported to the secretary of state that all the stock of the said corporation had been described. Said commissioners further reported that it was agreed by and between the subscribers to the capital stock of said company that said shares of stock in the said Union Steel Company should be divided into two classes of stock, one to be denominated preference stock and the other common stock; that the preference of said preference shares should be to draw a seven per cent. annual dividend, payable out of dividends declared only after January 15th of each year after the year 1884, but that if such dividend was not declared and paid or if any part thereof was not paid in any year or years such annual dividend or any unpaid portion thereof should be cumulative and should be paid out of dividends declared in any subsequent year or years, and when the net earnings of said company would in the discretion of its board of directors justify the declaring and paying of such passed dividends; that after such dividends on such preference stock should have been declared and the money set aside to pay such dividends in full, in the manner aforesaid, a dividend not greater than seven per cent. annually might be paid upon said common shares out of the net earnings of said company in any year, but no dividend on said common stock should be payable unless the board of directors should declare a dividend on such common stock: that if no dividend should be declared on such common stock for any year the said dividend should not be cumulative, and no right to any dividend for that year should exist thereafter in favor of such stock or the holders thereof; that after such dividends should have been declared and paid in full upon said preferences and common shares of stock in the manner aforesaid, any and all additional dividends declared shall be declared and paid on all shares of stock *pro rata*, regardless of the preference of said preference shares of stock, and that in case of liquidation of the affairs of said company and of its assets, whether voluntary or involuntary, that the preference shares of stock should be paid in full before any payment might be made upon said shares of common stock.

Said commissioners also reported that at a meeting of the subscribers of said stock, held in the city of Chicago on the 16th day of February, A. D. 1884, that Henry H. Porter, C. W. Hilliard, James B. Goodman, M. A. Farr, Henry A. Gardner, Robert D. McFadden, George S. Lyon, William A. Gardner, Arthur E. Sturgess, James W. Ferry, and Oliver G. Fessenden were each elected a director of said corporation for the period of one year.

That the final certificate of incorporation of the Union Steel Company was issued by the secretary of state of the State of Illinois on the 19th day of February, A. D. 1884.

That the said North Chicago Rolling Mill Company and the said Union Steel Company, respectively, engaged in business under and by virtue of the respective powers conferred upon said corporations; that they maintained and operated plants at which they respectively manufactured and sold upon the market and by contract the

various kinds of manufactured iron which they were authorized by their respective charters to manufacture and sell.

That thereafter it was determined by the officers, directors, and shareholders of the said North Chicago Rolling Mill Company and the said Union Steel Company to consolidate said corporations, and pursuant to said determination articles of consolidation were prepared, which said articles of consolidation were submitted to the stockholders of said North Chicago Rolling Mill Company, and which said articles of consolidation were also submitted to the stockholders of the Union Steel Company at meetings of the stockholders of said corporations respectively; that the said articles of consolidation were submitted at said stockholders' meetings on the first and 2nd days of May, A. D. 1889, and that the stockholders of said respective corporations at said respective meetings respectively adopted and approved said articles of consolidation, and thereafter, by their respective presidents and secretaries, certified their respective actions upon said articles of consolidation to the secretary of state of the State of Illinois, together with the affidavits of their respective presidents, in which said affidavits the presidents of said North Chicago Rolling Mill Company and said Union Steel Company respectively made oath that the record and certificate of said consolidation so filed in the office of the secretary of state by said respective companies were true in substance and in fact; that said certificates of consolidation, together with the said affidavits of the said presidents of said corporations, were filed in the office of the secretary of state on the 3rd day of May, A. D. 1889.

That the said articles of consolidation, so adopted by said corporations respectively, provided for the consolidation with each other of said corporations, and for the consolidating, uniting, and merging their capital stock, their corporate and other franchises, rights, privileges, immunities, and property of every kind, nature, and description, and that the consolidated corporation so created should be known by the corporate name of the Illinois Steel Company; that said articles of consolidation provided for the transfer of all property, franchises, and supplies, privileges, rights, and immunities of every nature and kind whatsoever, should be transferred by said constituent corporations to the said Illinois Steel Company; that the said Illinois Steel Company should assume the debts of said constituent companies and perform the contracts thereof.

That by said articles of consolidation the powers of said Illinois Steel Company were declared to be to carry on the business of smelting, rolling, or otherwise working iron and other metals; to mine, manufacture, and sell and to generally deal in any and all metals and the products of the manufacture thereof; to mine and purchase iron and other ore; to manufacture, sell, an- generally deal in iron and other ores; *to manufacture, sell, and generally deal in iron and other ores;* to manufacture, sell, and generally deal in iron and steel, in iron and steel ingots, blooms, railroad rails, billets, bar-, plate, wire rod; plain, bright, and galvanized wire; railroad frogs, switches, and crossings, and all other kinds of manufactured iron,

steel, and other metals; to mine and sell coal, manufacture and sell coke, and generally to produce, sell, and deal in any and all supplies or products necessary, convenient, or incidental to any of the purposes, objects, or business of said consolidated corporation; to own, complete, extend, improve, maintain, and operate each of the several works and other properties heretofore owned by the respective parties hereto, and to use and enjoy all of the corporate and other franchises, rights, privileges, immunities, and property of every nature and description which form a part of or are appurtenant or relate to any of said works or to any of the property, real, personal, or mixed, heretofore owned, used, or enjoyed by either of the respective parties hereto or by the predecessors, grantors, or assigns of any of them; to acquire by purchase, lease, or otherwise such additional real estate, works, mines, or other property located either in the State of Illinois or elsewhere, as may be necessary, convenient, or incidental to any of the purposes or objects of this consolidated corporation; and also thereafter to complete, extend, improve, maintain, use, enjoy, and operate such additional or other property as may be so acquired and constructed; to do all lawful things necessary for the purpose of carrying on its business in the several States and Territories where it operates; to renew and extend outstanding stock and franchises when deemed necessary to prevent their expiration; the power to own, acquire, hold, possess, and enjoy property, real, personal, and mixed, located in Illinois or elsewhere, and to sell, convey, lease, mortgage, pledge, or dispose of the same or any part thereof; the power to consolidate with other companies and to sue, borrow money, and to conduct its business generally as individuals.

That the capital stock of said consolidated corporation was fixed at twenty-five million dollars; nine million five hundred and ten thousand dollars of said amount represented the capital stock of the North Chicago Rolling Mill Company and three million four hundred and eighty-six thousand dollars represented the capital stock of the Union Steel Company; that the stockholders of said constituent companies should be stockholders of the consolidated corporation upon exchange of their stock for consolidated stock in the proportion in which they are severally entitled thereto; that the consolidated stock should be issued as aforesaid only upon surrender of stock issued by said constituent corporations for cancellation; that the consolidated stock might be sold and issued as authorized by the board of directors to acquire property in Illinois or elsewhere, which the board of directors might deem necessary, convenient, or proper to carry out the objects of the consolidated corporation, or for acquiring stocks of other corporations within or without Illinois, or for any purpose which may, in the judgment of the board of directors, be conducive to the interests of said company.

That thereafter said constituent corporations respectively transferred to the said consolidated corporation, being the Illinois Steel Company, all their respective real estate wheresoever situated, together with all buildings, shops, improvements, works, manufactu-

ries, and manufacturing plants and apparatus, sheds, stocks, furnaces, and machinery, with all equipment therefor, together with all their respective interests in operating and other contracts pertaining to their respective businesses, together with all and singular their respective rights, franchises, easements, privileges, immunities, and leases belonging or in any way appertaining to said above-described real estate and manufacturing plants operated in connection with said real estate, and that the shareholders of the shares of stock issued by said constituent corporations respectively surrendered their shares of stock in said constituent corporations, and received in lieu thereof the proportion of the stocks of the said consolidated corporations to which they were respectively entitled, and thereupon the stocks so having been exchanged for the stocks of the Illinois Steel Company were cancelled.

That thereafter the said constituent corporations respectively transferred their respective properties to the Illinois Steel Company in accordance with said articles of consolidation, and thereupon the Illinois S eel Company took possession of all of said property, and from thence hitherto has controlled and operated said property as a corporation under said articles of consolidation, and the said Illinois Steel Company, in the management of the affairs of said company, claims the right and privilege of exercising all the powers set forth and specified in said articles of consolidation and in accordance with the provisions thereof.

That under the laws of the State of Illinois corporations consolidating under the provisions of the statutes of said State can confer upon the consolidated corporations no greater powers and privileges than the powers and privileges conferred upon said constituent corporations by virtue of their respective incorporations.

That thereafter the said consolidated corporation increased its capital stock from twenty-five millions of dollars, as designated and expressed in the articles of consolidation, to the sum of fifty millions of dollars, and filed a certificate of increase of said capital stock, as aforesaid, in the office of the secretary of state of the State of Illinois on the 13th day of February, 1892, together with an affidavit of the president of the said Illinois Steel Company to the effect that the contents of said certificate of increase of capital stock were true; that notwithstanding the fact that the capital stock of said constituent corporations was, at the time of said consolidation, but five million six hundred thousand dollars, said article- of consolidation professed to fix the capital stock of the said consolidated corporation at the sum of twenty-five million dollars, which said corporation thereafter increased from twenty-five to fifty millions of dollars, as aforesaid, and that said The Illinois Steel Company now claims and professes that its capital stock is fifty millions of dollars, and that it has issued capital stock largely in excess of the combined capital stocks of said constituent corporations at the time of said consolidation, and that in representing to the world that it has an authorized capital stock of fifty million dollars and in issuing shares of stock in excess of the combined capital stock of said constituent corporations said The Illinois Steel Company has acted in the premises without

warrant or authority of law and has usurped the power and privilege of issuing the said capital stock in excess of the combined capital stock of said constituent corporations at the time of said consolidation without warrant or authority of law and has usurped said power.

That under and by virtue of said articles of consolidation the Illinois Steel Company claims that it has a right to purchase and own the stocks of other corporations and to control and operate such corporations when the holdings of their capital stocks amount to a majority of the stocks so issued by said corporation, and that it has purchased all of the stocks issued by the Joliet Steel Company, a corporation organized under the laws of the State of Illinois, with its principal office and plant at Joliet, Illinois, and now claims to own said stocks and claims to own all of the tangible property of said Joliet Steel Company and operates and controls the same as shall best subserve its purpose; that in so buying the capital stock and the property of the Joliet Steel Company said The Illinois Steel Company has acted without warrant or authority of law and has usurped and still continues to usurp the right, power, and privilege of owning and controlling the stocks and property of the said Joliet Steel Company without warrant or authority of law.

That said The Illinois Steel Company claims the power to own, acquire, hold, possess, and enjoy property, real, personal, and mixed, located in Illinois or elsewhere, and to sell, convey, lease, mortgage, pledge, or dispose of the same or any part thereof; that by virtue of the power so claimed by the said Illinois Steel Company it has purchased and caused to be conveyed to it real estate located in Illinois and elsewhere, and claims the right to deal in the same in such manner as shall best subserve the interests of said corporation; that the said Illinois Steel Company is not authorized by the powers and privileges which it can lawfully enjoy and exercise to deal in real estate in manner and form as aforesaid, and that in so buying and owning real estate for speculative purposes the said Illinois Steel Company has acted and still acts without warrant or authority of law, and the said Illinois Steel Company has purchased, without warrant or authority of law, as aforesaid, real estate which is not necessary in the exercise and discharge of the powers which it has a right to enjoy under and by virtue of said consolidation, and the power to so buy such real estate as is unnecessary for its legitimate corporate purposes the said Illinois Steel Company has usurped and still continues to usurp.

That while the respective charters of said constituent corporations conferred upon them respectively the right to acquire and hold such amounts of real estate as might be necessary to enable them to carry on the business which they were incorporated to carry on, that in the articles of consolidation respectively executed and adopted by them they sought to confer upon the board of directors of the consolidated company the power to acquire and purchase such quantities of real estate in the State of Illinois or elsewhere as the board of directors of said consolidated corporation might deem necessary; that said constituent corporations could not endow said

consolidated company with greater powers in the premises than they themselves possessed; that the said Illinois Steel Company claims the right to acquire and own all real estate, wheresoever situated, which the board of directors of said company deem necessary, and that said Illinois Steel Company, through its board of directors, has acquired title to and possession of large quantities of real estate under and by virtue of the pretended power so sought to be conferred upon said consolidated corporation as aforesaid by said constituent companies; that in so acquiring such real estate and under and by virtue of said power the said Illinois Steel Company has acted without warrant or authority of law, and the right to acquire real estate beyond such as was necessary to enable said consolidated corporation to carry into effect its legitimate business is a power and right which said Illinois Steel Company has usurped and still continues to usurp.

That the said constituent corporations attempted to confer upon the said Illinois Steel Company the power to issue millions of dollars in shares of said consolidated corporation, to be expended, in the discretion of its board of directors, in manner and form as they should deem necessary, convenient, or proper to carry out the objects of the consolidated corporation or for acquiring stocks of other corporations within or without Illinois or for any purpose which might in the judgment of the board of directors be conducive to the interest of said company; that under and by virtue of said provisions in the articles of consolidation so approved and adopted by said constituent corporations the board of directors of the said Illinois Steel Company claim the right to exercise their discretion and to invest the funds and stocks of said Illinois Steel Company in such manner and for such purposes as may result in pecuniary benefits to the shareholders of the said Illinois Steel Company without regard to the legality of such investments; that in exercising such a discretion and in making such investments without legal authority said The Illinois Steel Company has acted without warrant of law, and in making such investments as aforesaid has and still continues to usurp powers and privileges not acquired by it by reason of the consolidation of the franchises of said constituent corporations.

That said constituent corporations in and by the said articles of consolidation and so adopted by them respectively, as aforesaid, sought to confer power upon the said Illinois Steel Company to issue and sell shares of the capital stock of said consolidated corporation for the purpose of retiring bonds, which bonds were secured by a mortgage entered into between the Union Steel Company and the Metropolitan Trust Company of New York, dated August 14th, A. D. 1886; that under and by virtue of said power the Illinois Steel Company has retired said bonds by sales of its shares of its capital stock in accordance with the said pretended power; that the power to issue said stock for said purpose was without warrant or authority of law and was a usurpation of power upon the part of the said Illinois Steel Company.

Second. And, further answering, the defendants deny each and

every allegation and thing in plaintiff's complaint contained not hereinafter specifically admitted, stated, or denied; and the defendants allege that the plaintiff has never used, occupied, or held the premises set forth in the complaint in the conduct of its business, and such premises are in no way necessary or incident to its business, nor have such premises ever been held, occupied, or used in the conduct of the business of the Swedes Iron Company, the Milwaukee Iron Company, or the North Chicago Rolling Mill Company or either or any of them, nor were the premises described in the complaint necessary to or in any way incident to the business of the plaintiff or either or any of the aforesaid companies; and the defendants upon information and belief allege that neither the plaintiff nor any one of said companies ever had either actual or constructive possession of the premises set forth in the complaint herein.

Third. And, further answering, the defendants allege upon information and belief that one John Stien and his wife on or about the 1st day of January, A. D. 1873, entered upon all the real estate and premises which adjoined and abutted the premises set forth in the complaint herein (and which real estate and premises set forth in the complaint herein were at that time beneath the waters of the river and lake from several inches to several feet and abutted and adjoined said premises so occupied by John Stien and his wife, and any and all accretions of soil thereto from said waters immediately thereupon became the property of said John Stien and wife), and the said John Stien and wife at the aforesaid time took possession of all of the aforesaid described real estate and premises in their own right and as their own property and held the same thereafter adversely to the whole world; that they, the said John Stien and wife, protected such of the aforesaid described real estate and premises as were above the water with a substantial enclosure and fence, and from said time occupied all of such property with their family as their residence and homestead until on or about the 1st day of September, A. D. 1884, when said real estate and premises were sold and the possession and ownership thereof were turned over to Joe Poozocha, who thereafter and on or about the 1st day of January, A. D. 1891, gave and turned over to John Budzisz and August Budzisz, alias Anastazius Budzisz, the defendants herein, the real estate and premises set forth in the plaintiff's complaint herein, and said defendants, John Budzisz and August Budzisz, alias Anastazius Budzisz, have had possession of the same and held the same adversely to the whole world, and all of said real estate and premises have been held adversely against the whole world for more than twenty years by the said John Stien and wife and Joe Poezocha and wife and John Budzisz and August Budzisz, alias Anastazius Budzisz, the defendants herein; that during their respective ownership and ever since 1873 the real estate and premises aforesaid mentioned have been protected by them with substantial inclosures and fences and occupied by them and each of them adversely to the plaintiff and to the whole world, and that each and all of said persons so holding adversely since 1873 have made continual improve-

ments upon the premises described in the complaint and usually cultivated the same; that the premises set forth in the complaint herein have largely been filled in by accretion and by the labors of defendants, and previously to such accretions and labors were beneath the water, and at all times since 1873 defendants and the aforesaid persons have held the same adversely to the plaintiff and to all the world other than themselves.

And the aforesaid facts are pleaded specifically and specially pursuant to sections 4213, 4214, and 4215, R. S. of Wisconsin, 1878, in bar of the plaintiff's cause of action herein.

Fourth. And the defendants upon information and belief allege that neither John W. Pixley, nor Robert Ten Eyck, nor Squire Alexander, nor Edmund B. Dickerman, nor either or any of them, ever had either actual or constructive possession of the premises set forth in the complaint herein, and each and all of said parties were out of the actual possession of the said premises mentioned in the complaint herein for more than five (5) successive years immediately following the making, execution, delivery, and recording of any deeds in which either or any of them were named as grantees, and never began at any time any action or actions to recover the possession thereof, and each and all of said parties, to wit, John W. Pixley, Robert Ten Eyck, Squire Alexander, and Edmund B. Dickerman, were wholly without title and possession, either actual or constructive, at the time of the execution of divers conveyances by them respectively made which relate to the premises described in the plaintiff's complaint herein, and that each and all of the several grantees named in the several conveyances aforesaid wholly failed to acquire and wholly failed to take either actual or constructive possession at any time under said conveyances, and wholly failed ever to begin any actions or actions to recover possession thereof, and wholly failed to acquire any title thereunder, and said facts are pleaded specially and specifically in bar of the plaintiff's cause of action herein pursuant to section 32, chapter 22, Laws of 1859, which is embodied in section 1187, R. S., and pursuant to section 1187, R. S., and the amendments thereto.

Fifth. And, further answering, upon information and belief the defendants allege that the premises set forth in the plaintiff's complaint at the time of the making, delivery, and recording of any and all of the deeds referred to in the fourth (4th) subdivision of this answer and for more than six months immediately preceding such time and for more than six months immediately preceding the expiration of redemption were in the actual occupancy of divers persons claiming adversely to the aforesaid named persons in the fourth (4th) subdivision of this answer, and that no written notice was served on the said persons in actual occupancy, claiming adversely, by the holder of the tax certificate and tax certificates upon which such deed and such deeds issued either three months prior to the issuing of said deed or at any other time, and said facts are pleaded specially and specifically in bar of the plaintiff's cause of action herein pursuant to section 38, chapter 22, Laws of 1859, as

embodied in section 1200, R. S. of Wisconsin, 1878, and pursuant to said section 1200, R. S. of Wisconsin, 1878.

Sixth. And, further answering, upon information and belief the defendants allege that the Swedes Iron Company never had authority to and was wholly without authority to purchase and to speculate in tax certificates and in tax titles and to hold the same, and such conduct was neither incident nor necessary to its business nor within its corporate powers, and that each and all and every of such tax certificates and tax deeds which affect the real estate set forth in the complaint herein so taken and so held by the Swedes Iron Company were and are in excess of its corporate powers and null and void, and such facts are specially pleaded in defense of the plaintiff's cause of action.

Seventh. And, further answering, upon information and belief the defendants allege that the Milwaukee Iron Company never had authority to and was wholly without authority to purchase and to speculate in tax certificates and in tax titles and to hold the same, and that such conduct was neither incident to nor necessary to its business nor within its corporate powers, and that each and all and every of such tax certificates and tax deeds and tax titles which affect the real estate set forth in the complaint herein so taken and so held by the Milwaukee Iron Company were and are in excess of its corporate powers and null and void, and such real estate was not necessary for the conduct of its business and was not acquired by it in receiving and collecting its debts, and such facts are specially pleaded in defense of the plaintiff's cause of action.

Wherefore the defendants demand judgment that this action abate, or in lieu thereof that the plaintiff's complaint be dismissed, and that the defendants be adjudged to be the owners in fee-simple of the premises described in the plaintiff's complaint, together with the costs of this action.

RUBLEE A. COLE,
Attorney for Defendants.

STATE OF WISCONSIN, }
Milwaukee County, } ss:

John Budzisz and August Budzisz, alias Anastazius Budzisz, each for himself being duly sworn, each deposes and says that he is one of the defendants named in the foregoing answer and makes this affidavit on his own behalf, and that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the facts therein stated upon information and belief, and as to those he believes it to be true.

JOHANN BUDZISZ.
ANASTAZIUS BUDZISZ.

Sworn and subscribed to before me this 8th day of April, A. D. 1896.

[SEAL.]

RUBLEE A. COLE,
Notary Public, Milwaukee County, Wisconsin.

* * * * * * *

Amended Answer.

United States Circuit Court, Eastern District of Wisconsin.

ILLINOIS STEEL COMPANY, Plaintiff,
vs.
JOHN BUDZISZ and AUGUST BUDZISZ, (alias) ANASTAZIUS BUDZISZ, Defendants.

And now come John Budzisz and August Budzisz, alias Anastazius Budzisz, by Rublee A. Cole, their attorney, and for their amended answer herein to the complaint of the plaintiff herein allege and show to the court—

That the seven subdivisions of the original answer herein and all the matters and things therein alleged and set forth are hereby alleged and set forth and repeated and by this reference incorporated into this amended answer as fully and to the same effect as though set forth at length herein under and by virtue of the within stipulation of the parties hereto, dated the 15th day of March, A. D. 1897.

Eighth. And further, by way of amended answer herein, the defendants allege that they are informed and verily believe that the title of the United States in and to the property set forth in the plaintiff's complaint has never been extinguished, and that the title to such property, except as hereinafter set forth, is now in the United States; that any pretended claim of title on the part of the plaintiff to the property set forth in the complaint herein, which property is a part of lots one (1) and two (2) of fractional section 33, township seven (7) north, range twenty-two (22) east, was and is derived through a purported entry as a "float" or "floating right" of said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, on July 30th, 1835, at the Green Bay land office, by one Daniel Darnell.

That the defendants are informed and verily believe that the entry of Increase Claflin and Daniel Darnell, at the United States land office at Green Bay, Michigan Territory, on the 30th day of July, 1835, of lot one (1) of fractional section eight (8), township twenty-two (22) north, range twenty (20) east, containing 41.80 acres, as under "pre-emption act, 1834," with their residence therein stated as Brown county, Michigan Territory, was and is wholly void and insufficient and lacked the essential ingredients both in law and fact, both in the matter of residence and occupation under and by virtue of the several laws of the United States, to authorize Increase Claflin and Daniel Darnell, or either or any of them, to have, hold, or locate any of the public lands of the United States as a "float" or as a "floating right," and that such entry was and is null and void so far as conferring any right either upon Increase Claflin or said Daniel Darnell to enter, locate, hold, or have any of the public lands of the United States as a "float" or as a "floating right."

That the defendants allege upon information and belief that neither said Increase Claflin nor said Daniel Darnell resided upon and cultivated prior to the year 1829 the aforesaid described lands contained in the aforesaid joint entry, nor were they in joint possession of said described lands on the 19th day of June, 1834, nor had they or either of them cultivated any part of said lands in the year 1833.

That the defendants are informed and verily believe that the Indian title of lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east (which description contains the land and premises set forth in the complaint herein), was not extinguished on the 29th day of May, 1830, and upon that day was in the Indians, and that the title to the aforesaid lots one (1) and two (2), with other lands, was conveyed to the United States by a treaty with the Menomonee tribe of Indians on February 8th, 1831.

That your defendants are informed and verily believe and allege that the aforesaid Daniel Darnell did not cultivate any portion of said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, at any time or during any portion of the year 1833, and was not in possession of said lots one (1) and two (2) or any portion thereof on the 19th day of June, 1834, and said Daniel Darnell did not reside on and cultivate said lots one (1) and two (2) or any portion thereof prior to the year 1829.

That your defendants are informed and verily believe that the entry on the 30th day of July, 1835, at the United States land office at Green Bay, Michigan Territory, by the aforesaid Daniel Darnell, as a "float" or "floating right" of and on lots one (1) and two (2) of said fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, was and is null and void and in no way extinguished the title of the Government of the United States, and any purported patents thereon by the United States to any person or persons were and are null and void, and that the title to the aforesaid lots one (1) and two (2) and to the premises set forth in the complaint herein (which premises in dispute exceeds the sum or value of two thousand dollars, exclusive of interest and costs) is under the Constitution and laws of the United States and the treaties made under their authority in the United States, and that such title of the United States is not yet extinguished.

Wherefore the defendants ask and demand that the complaint of the plaintiffs herein be dismissed with costs.

RUBLEE A. COLE,
Attorney for Defendants.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

August Budzisz, alias Anastazius, being duly sworn, deposes and says that he is one of the defendants named in the foregoing amended answer, which amended answer he has heard read and knows the contents thereof, and that the same is true of his own

knowledge except as to those things stated therein upon information and belief, and as to those he verily believes it to be true, and that the new paragraph eighth in this amended answer as a further defense herein, together with and in addition to the original answer herein, shall constitute and be the amended answer herein under and by virtue of the stipulation herein dated March 15th, 1897, as fully as though all said allegations in the original answer were again set forth herein at length, and that this affidavit is made both upon his own behalf and in behalf of the other defendant herein.

ANASTAZIUS BUDZISZ.

Subscribed and sworn to before me this 2nd day of April, A. D. 1897.

RUBLEE A. COLE,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

* * * * * * *

April 26, 1897.—This day came the parties, by their counsel, and, on consideration of the motion of the plaintiff for an order striking out certain portions of the answer of the defendants herein, it is ordered by the court that said motion be granted with leave to the defendants to amend in respect of the allegations in the third, fourth, and fifth defenses of the answer if they shall be so advised.

* * * * * * *

United States Circuit Court, Eastern District of Wisconsin.

ILLINOIS STEEL COMPANY, Plaintiff,
vs.
JOHN BUDZISZ and AUGUST BUDZISZ, (alias) ANASTAZIUS BUDZISZ, Defendants.

And now come John Budzisz and August Budzisz, alias Anastazius Budzisz, by Rublee A. Cole, their attorney, and for their second amended answer herein to the complaint of the plaintiff herein allege and show to the court:

The defendants above named admit that each of them are residents and citizens of the State of Wisconsin and reside at Milwaukee, in the eastern district of said State of Wisconsin.

And further answering, in addition to the matter not stricken out of the original answer, the defendants allege and show to the court that the said defendants have no knowledge or information sufficient to form a belief as to the correctness of the description of the premises set forth in the plaintiff's complaint, and which it is alleged that the defendants unlawfully withhold the possession of said premises from the plaintiff; but the said defendants admit that since on or about the first day of January, A. D. 1891, the said defendants, John Budzisz and August Budzisz, alias Anastazius Budzisz, have had possession of certain portions of lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, and have occupied the same; but upon information and belief deny that they have wrongfully detained

the same from the possession of the plaintiff, and upon information and belief deny that they have unlawfully withheld the possession of the said premises from the said plaintiff, and upon information and belief deny that the said plaintiff has been damaged in any sum whatsoever.

And, further answering, the defendants deny each and every allegation in the plaintiff's complaint contained not hereinbefore or hereinafter specifically admitted, stated, or denied.

And further, by way of a second amended answer herein and as matter of defense herein and by way of a counter-claim herein, the defendants allege that they are informed and verily believe that the title of the United States in and to the property set forth in the plaintiff's complaint has never been extinguished, and that the title to such property, except as hereinafter set forth, is now in the United States; that any pretended claim of title on the part of the plaintiff to the property set forth in the complaint herein, which property is a part of lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, was and is derived from a purported entry as a "float" or "floating right" of said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, on July 30th, 1835, at the Green Bay land office by one Daniel Darnell.

That the defendants are informed and verily believe that the entry of Increase Claflin and Daniel Darnell, at the United States land office at Green Bay, Michigan Territory, on the 30th day of July, 1835, of lot one (1) of fractional section eight (8), township 22 north, range (20) twenty east, containing 41.80 acres, as under "preemption act 1834," with their residence therein stated as Brown county, Michigan Territory, was and is wholly void and insufficient and lacked the essential ingredients both in law and fact, both in the matter of residence and occupation under and by virtue of the several laws of the United States, to authorize Increase Claflin and Daniel Darnell or either or any of them to have, hold, or locate any of the public lands of the United States as a "float" or as a "floating right," and that such entry was and is null and void so far as conferring any right, either upon Increase Claflin or said Daniel Darnell, to enter, locate, hold, or have any of the public lands of the United States as a "float" or as a "floating right," and that such entry was and is null and void so far as conferring any right, either upon Increase Claflin or said Daniel Darnell, to enter, locate, hold, or have any of the public lands of the United States as a "float" or as a "floating right."

That the defendants are informed and verily believe that the said lot one (1) of fractional section eight (8), township twenty-two (22) north, range twenty (20) east, which contain- 41.80 acres and which was and is situated east of the Fox river and in a southernly direction from the Blackbird island, was not a quarter section nor a half quarter section nor a residuary quarter quarter of a section, nor was it a residuary quarter quarter of a section, made such by locations made under the act of Congress of the 5th of April, 1832, and was not such a tract of land as to authorize a float or floating right upon

a joint entry thereon by two persons under the act of Congress of the 29th of May, 1830, and under the act of Congress of the 19th of June, 1834, and that the said joint entry, as the defendants are informed and believe, was and is null and void, so far as vesting in either said Increase Claflin and Daniel Darnell or either of them the right to locate a float or floating right elsewhere upon the public lands of the United States in the said land district under the aforesaid laws.

That the defendants are informed and verily believe that the said Increase Claflin lived on the said lot one (1) of fractional section eight (8), township twenty-two (22) north, range twenty (20) east, with his family in a good dwelling-house on the 19th of June, 1834, and had lived there ever since from the year 1832 till about the 10th day of May, 1835, and no longer, and had cultivated a portion of said land in the years 1833 and 1834 and resided upon said land on the 19th day of June, 1834, but had not resided upon and cultivated said land during the year 1829 nor the year 1830, nor was he residing upon said land or in possession thereof on the 29th of May, 1830, nor had he resided upon and cultivated the said land prior to the year 1829, as the defendants are informed and verily believe.

And the defendants allege upon information and belief that the said Increase Claflin was not the sole and only occupant of said lot one (1) of fractional section eight (8), in township number twenty-two (22) north, range twenty (20) east, in 1833 and 1834, but that Daniel Darnell also occupied and cultivated a part of said lot one (1) of fractional section eight (8), in township number twenty-two (22) north, range twenty (20) east, in 1833 and 1834, and resided upon the same during said years in the house of Increase Claflin and was a single man and boarded in the family of Increase Claflin, and Daniel Darnell so resided on the 19th of June, 1834; and the defendants further allege upon information and belief that the said Daniel Darnell did not reside upon and did not cultivate said land in the years 1829 and 1830 or either of said years, nor did said Daniel Darnell reside upon and cultivate said lands prior to the year 1829, nor was said Daniel Darnell in possession of said land or any part thereof on the 29th of May, 1830.

That the defendants are informed and verily believe that the Indian title to lot one (1) of fractional section eight (8), township twenty two north, range twenty (20) east, which contained 41.80 acres, and a joint entry of which was made by the said Increase Claflin and Daniel Darnell on the 30th day of July, 1835, at the Green Bay, Michigan Territory, local United States land office, was not extinguished on the 29th of May, 1830, and upon that day was in the Indians, and that the Indian title to the aforesaid lot one (1) of fractional section eight (8), township twenty-two (22) north, range twenty (20) east, with other lands, was conveyed, as the defendants are informed and verily believe, to the United States under and by virtue of several treaties with the Menomonee tribe of Indians as follows, to wit:

The purported treaty of the date of the 8th of February, 1831, and the supplemental article thereto, dated February 17th, 1831, which

were conditionally ratified by the Senate of the United States on the 25th day of June, 1832, and the provisional ratification thereof signed by the President of the United States on the 9th day of July, 1832, and the purported treaty with the Menomonee Indians, dated the 27th day of October, 1832, which was ratified by the Senate of the United States by the resolutions of said Senate on the second day of March, 1833, and such ratification, with the advice and consent of the Senate, signed by the President of the United States on the 13th day of March, 1833.

That your deponents are informed and verily believe that thereafter a treaty was made and dated on the 18th day of October, 1848, between the United States and the Menomonee tribe of Indians whereby, among other things, "the said Menomonee tribe of Indians agree to cede, and do hereby cede, sell and relinquish to the United States all their lands in the State of Wisconsin, wherever situated," and which treaty was duly ratified on the 23rd of January, 1849.

That the defendants are informed and verily believe that under and by virtue of the sixth subdivision of the aforesaid treaty of the 8th day of February, 1831, "the Menomonee tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox river and Green Bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President, they conducting themselves peaceably and orderly."

That the defendants are informed and verily believe and allege that township number twenty-two (22) north of range twenty (20) east was surveyed in 1834, and a plat of survey of said township was certified to be strictly conformable to the field-notes of the survey thereof on file in the office of the surveyor general at Cincinnati July 21st, 1835, which field-notes had been examined and approved, and such certificate was signed by Rob't T. Lytle, the surveyor general, on the said July 21st, 1835.

And the defendants are informed and verily believe and further allege that the lands included in township number twenty-two (22) of range twenty (20) were first offered for sale, with other lands, by the President by his proclamation dated the sixth day of May, A. D. 1835.

That the defendants are informed and verily believe that by reason of the aforesaid treaties and in conformity with the reasoning of the opinion of the solicitor of the Treasury of the date of the 21st of February, 1837, the said township twenty-two (22) of range number twenty (20) was not subject to entry nor was any part thereof subject to entry under act of Congress of the 29th of May, 1830, nor under the act of the 19th of June, 1834, nor was any part of said township subject to entry under said laws, and the aforesaid joint entry of Increase Claflin and Daniel Darnell was and is contrary to law and to the treaties of the United States, and the said joint entry was and is null and void.

That the defendants are informed and verily believe that for the same reason the patent of the United States dated the first day of September, 1838, to Alexander J. Irwin, assignee of Increase Claflin

and Daniel Darnell, for the said lot number one (1) of fractional section eight (8), in township twenty-two (22) north, of range twenty (20) east, in the district of land subject to sale at Green Bay, was and is null and void.

That the defendants are informed and verily believe and allege that the Indian title of lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east (which description contains the land and premises set forth in the complaint herein), was not extinguished on the 29th day of May, 1830, and upon that day was in the Indians, and that the Indian title to the aforesaid lots one (1) and two (2) of said fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, was conveyed to the United States by the same treaties as was township number twenty-two (22), range twenty (20) east, which treaties have been heretofore set forth herein, and that said lands in said fractional section thirty-three (33) were first offered for sale, with other lands, by the President by his proclamation dated the sixth day of May, A. D. 1835, and that township seven (7), range twenty-two (22) east, was surveyed in first quarter of 1835 and a plat of survey thereof duly certified July 21, 1835, by Rob't T. Lytle, the surveyor general, and that by reason thereof the said lots one (1) and two (2) were not subject to be located upon and entered with a "float" or "floating right" under the act of Congress of the 29th of May, 1830, or under the act of Congress of the 19th of June, 1834, and that the said purported entry of Daniel Darnell of the said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, on the 30th day of July, 1835, at the United States land office at Green Bay, Michigan Territory, was and is null and void.

That the defendants are informed and verily believe and allege that the aforesaid Daniel Darnell did not cultivate any portion of said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, at any time or during any portion of the year 1833, nor any portion of the year 1834, nor did he reside upon the same during any portion of said years, and was not in possession of said lots one (1) and two (2) or any portion thereof on the 19th day of June, 1834, and said Daniel Darnell did not reside on and cultivate said lots one (1) and two (2) or any portion thereof during the year 1829, nor during the year 1830, and was not in possession of the said lots one (1) and two (2) on the 29th of May, 1830, and did not cultivate and reside on said lots one (1) and two (2) or any portion thereof prior to the year 1829; that the defendants are informed and verily believe that the patent of the United States dated the 16th day of April, 1838, to Albert G. Ellis, assignee of Daniel Darnell, based upon pre-emption float certificate No. 2, Green Bay series, under and by virtue of the laws of the United States and the aforesaid treaties herein set forth, was and is null and void and in no way extinguished the title of the Government of the United States to the aforesaid lots numbered one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, range

twenty-two (22) east, and that the title to the aforesaid lots one (1) and two (2) and to the premises set forth in the complaint herein (which premises in dispute exceeds the sum or value of two thousand dollars ($2,000), exclusive of interests and costs) is under the Constitution and the laws of the United States and the treaties made under their authority in the United States, and that such title of the United States is not yet extinguished; wherefore the defendants ask and demand that the aforesaid joint entry of Increase Claflin and Daniel Darnell, at the United States land office at Green Bay, Michigan Territory, on the 30th day of July, 1835, to lot one (1) of fractional section eight (8), township twenty-two (22) north, range twenty (20) east, containing 41.80 acres, be declared null and void and cancelled; that the aforesaid patent of the United States of the date of the first of September, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell, to said lot number one (1) of fractional section eight (8), township twenty-two (22) north, of range twenty (20) east, be declared null and void and cancelled; that the pre-emption float entry number two (2), made on the 30th day of July, 1835, at the United States land office at Green Bay, Michigan Territory, by the aforesaid Daniel Darnell, to lots one (1) and two (2) of said fractional section thirty-three (33), township seven (7) north, range twenty-two (22) east, be declared null and void and cancelled; that the patent of the United States, dated the 16th day of April, 1838, to Albert G. Ellis, assignee of Daniel Darnell, based upon pre-emption float certificate No. 2, for fractional section thirty-three (33), in township seven (7) north, of range twenty-two (22) east, in the district of lands subject to sale at Green Bay, be declared null and void and cancelled.

And, further, the defendants ask and demand that the complaint of the plaintiff herein be dismissed with costs.

RUBLEE A. COLE,
Attorney for Defendants.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

John Budzisz, being duly sworn, deposes and says that he is one of the defendants named in the foregoing second amended answer, which second amended answer he has heard read and knows the contents thereof, and that the same is true of his own knowledge except as to those things stated therein upon information and belief, and as to those he believes it to be true, and that this affidavit is made both upon his own behalf and in behalf of the other defendant herein.

JOHN BUDZISZ.

Subscribed and sworn to before me this 21st day of June, A. D. 1897.

RUBLEE A. COLE,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

* * * * * * *

July 30, 1897.—This day came the parties, by their counsel, and on consideration of the motion of the plaintiff to strike from the files portions of the second amended answer and also the first amended answer of the defendants, it is ordered by the court that said motion be, and hereby is, granted, and that the said first amended answer and that portion of the second amended answer beginning with the words "And further, by way of a second amended answer herein and as matter of defense herein and by way of counter-claim herein," in folio 4, down to and including the words " be declared null and void and cancelled," in folio 28 thereof, be, and are hereby, stricken out.

August 3, 1897.—This day came the defendants, by their attorney, and filed exceptions to the orders of April 26, 1897, and to the order of July 30, 1897; which exceptions are as follows:

United States Circuit Court, Eastern District of Wisconsin.

ILLINOIS STEEL COMPANY, Plaintiff,
vs.
JOHN BUDZISZ (alias) and AUGUST BUDZISZ (alias), Defendants.

And now come the defendants herein, by Rublee A. Cole, their attorney, and except to the order of the court herein dated *the* July 30th, 1897, and to each and every part thereof, based upon the motion made July 1, 1897, before this court, and further specifically except to the respective portions of said order as follows, to wit:

1.

The defendants specifically except to that portion of the aforesaid order as strikes out of the second amended answer the facts therein pleaded, in so far as such facts are pleaded as matter of defense, beginning with the words, in folio number 4 of said second amended answer, "And further, by way of a second amended answer herein and as matter of defense herein and by way of counter-claim herein," and including all of the said second amended answer following said words, down to and including the words " be declared null and void and cancelled," in folio 28 thereof.

2.

The defendants specifically except to that portion of the aforesaid order as strikes out of the second amended answer the facts therein pleaded, in so far as such facts are pleaded by way of counter-claim, beginning with the words, in folio number 4 of said second amended answer, "And further, by way of a second amended answer herein and as matter of defense herein and by way of counter-claim herein," and including all of the said second amended answer following said words, down to and including the words " be declared null and void and cancelled," in folio 28 thereof.

3.

The defendants specifically except to that portion of the aforesaid order as strikes out of the second amended answer all that

portion thereof beginning with the words, in folio number 4 of said second amended answer, "And further, by way of a second amended answer herein and as matter of defense herein and by way of counterclaim herein," and including all of the said second amended answer following said words, down to and including the words "be declared null and void and cancelled," in folio 28 thereof.

4.

The defendants specifically except to that portion of the aforesaid order striking out the whole of said first amended or amended answer.

Yours, &c., RUBLEE A. COLE,
Attorney for Defendants.

The foregoing exceptions and each of the same were duly taken and reserved this 3rd day of August, 1897.

By the court:

WM. H. SEAMAN, *Judge.*

* * * * * * *

And afterwards, to wit, on the twenty-eighth day of said term, to wit, on the 20th day of November, A. D. 1897, the following proceedings were had, to wit:

Judgment.

ILLINOIS STEEL COMPANY
vs.
JOHN BUDZISZ & AUGUST BUDZISZ, alias ANASTAZIUS BUDZISZ. } At Law.

This day came the plaintiff, by its counsel, and moved the court for judgment upon the verdict of the jury heretofore entered in this cause.

Whereupon it is considered and adjudged by this court now here that the said plaintiff, Illinois Steel Company, is the owner in fee-simple absolute of that portion of lots one and two of fractional section 33, township 7 north, range 22 east, in the city and county of Milwaukee and State of Wisconsin, and in the fifth ward of said city of Milwaukee, and bounded and described as follows, to wit: Commencing at a point which is 2 feet south 21 degrees east, 426 feet south 69 degrees west from the southeasterly corner of block 194, in the fifth ward, in said city and county of Milwaukee, Wisconsin; thence south 24 degrees 30 minutes east 44.70 feet to a point; thence south 60 degrees 45 minutes west 135 feet to a point; thence south 24 degrees east 12 feet to a point; thence south 66 degrees west 85.80 feet to a point; thence north 25 degrees 45 minutes west 70.80 feet to a point; thence north 66 degrees east 221 feet to the point of commencement, except the one undivided six hundred and eighty-third part of that portion of the said premises lying north of the center of Cooper street, and that the said plaintiff do have and recover of the said defendants, John Budzisz

and August Budzisz, alias Anastazius Budzisz, possession of the whole of said premises, together with six cents damages, so assessed by the jury, and one hundred and ninety-two dollars and forty-seven cents ($192.47), its costs and disbursements about its said suit in this behalf by it expended, and that it have a writ of possession and execution therefor.

Judgment-roll signed November 20th, A. D. 1897.

(Signed) EDWARD KURTZ, *Clerk.*

Damages	$0 06
Costs	192 47
	$192 53

* * * * * * *

Circuit Court of the United States, Eastern District of Wisconsin.

ILLINOIS STEEL COMPANY, Plaintiff,
vs.
JOHN BUDZISZ and AUGUST BUDZISZ, alias ANASTAZIUS BUDZISZ, Defendants. } At Law.

Assignment of Errors.

The defendants, John Budzisz and August Budzisz, alias Anastazius Budzisz, in this action, by Rublee A. Cole, their attorney, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon the trial of the cause, and which, under the judgment in this case, they aver occurred, to wit:

1. There was a denial of rights claimed under treaties of the United States.

2. That the purported patent of the United States under which plaintiff claims title was and is void, and was issued by officers of the Government without any provision of law authorizing the same.

3. That the ruling of the circuit court of the United States upon the decree in the partition proceedings was a divesting of a vested right in the defendants.

4. That the plaintiff in ejectment in this case in the United States circuit court recovered the possession of a street dedicated to the public by the consent of the parties to the partition decree, dated July 9, 1846.

5. That under the foreign will in this case no title to the premises in controversy is in the executor, though so adjudged in the circuit court of the United States.

6. That the certified copy of the will of Eber B. Ward, of Detroit Michigan, and the probate thereof, which was admitted in evidence was not competent evidence, either of the will or of its probate.

7. That the said copy of the will of Eber B. Ward was not properly authenticated.

8. That the copy of the probate of the said will of Eber B. Ward was not properly authenticated.

9. The judgment was in effect the taking of private property for other than a public use without due process of law.

10. The court erred in allowing the plaintiff's bill of costs.

11. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified township plat of township No. 22 north of range 20 east, marked "Defendants' Exhibit No. 3."

12. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified copy of the affidavit and declaratory statement of F. W. Tamms before the Wausau, Wisconsin, United States land office, that he, on or about the fifth or sixth day of January, 1888, and the other persons living on said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, of range twenty-two (22) east, at other times have settled and improved the said lots, and declaring his intention in behalf of himself and in behalf of all persons now living thereon to claim the said tract of land, etc.; which affidavit and declaratory statement is marked "Defendants' Exhibit No. 4."

13. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified copy of the affidavit of F. W. Tamms before the Wausau, Wisconsin, United States land office, claiming the right of pre-emption and entry under the various laws of the United States applicable thereto in behalf of himself and in behalf of all persons now living and residing on said lots one (1) and two (2) of fractional section thirty-three (33), township seven (7) north, of range twenty-two (22) east, and declaring their intention to claim the said tract of land as of right under the several statutes of the United States applicable thereto, etc., and which certified copy of affidavit is marked "Defendants' Exhibit No. 5."

14. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified copy of the naturalization certificate of F. W. Tamms, which was filed with his applications before the United States land office at Wausau, Wisconsin, and which certified copy of the said certificate of naturalization is marked "Defendants' Exhibit No. 6."

15. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified copy of the power of attorney and authority of Rublee A. Cole to appear in behalf of the said applicants before the United States land office at Wausau, Wisconsin, and before the General Land Office and the Department of the Interior in behalf of said applicants, and which certified copy is marked "Defendants' Exhibit No. 7."

16. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified copy of the decision of the Wausau, Wisconsin, United States land office rejecting the application of the said F. W. Tamms, and which certified copy is marked "Defendants' Exhibit No. 8."

17. The court erred in the rejection of the evidence offered by the defendants in rejecting the certified copy of the notice of appeal of the said F. W. Tamms from the decision of the Wausau, Wisconsin, local United States land office to the honorable Commissioner of the

General Land Office and the assignment of errors in said matter, and which certified copy is marked "Defendants' Exhibit No. 9."

18. The court erred in the rejection of the evidence offered by the defendants in rejecting the certificate that each of the aforesaid exhibits from the United States local land office at Wausau, Wisconsin, are true and correct copies of the originals; which certificate is marked "Defendants' Exhibit No. 10."

19. The court erred in the rejection of the evidence offered by the defendants in rejecting the certificate of the Commissioner of the General Land Office as to the appointment and qualification and as to the existing register of the United States land office at Wausau, Wisconsin; which certificate is marked "Defendants' Exhibit No. 11."

20. The court erred in the rejection of the evidence offered by the defendants in rejecting the opinion and decision of the Commissioner of the General Land Office affirming the decision of the Wausau, Wisconsin, land office in rejecting the application of F. W. Tamms in behalf of himself and others for the land therein described; which decision is marked "Defendants' Exhibit No. 12."

21. The court erred in the rejection of the evidence offered by the defendants in rejecting the notice of appeal of F. W. Tamms in behalf of himself and of others from the decision of the honorable Commissioner of the General Land Office to the honorable Secretary of the Interior; which notice of appeal is marked "Defendants' Exhibit No. 13."

22. The court erred in the rejection of the evidence offered by the defendants in rejecting a letter from the honorable Secretary of the Interior to Rublee A. Cole, Esq., Milwaukee, Wisconsin, in the matter of the said appeal of F. W. Tamms, and which letter is marked "Defendants' Exhibit No. 14."

23. The court erred in the rejection of the evidence offered by the defendants in rejecting a letter from the General Land Office dated May 17th, 1897, in substance that the appeal of F. W. Tamms from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, together with the papers in the case, have been transmitted to the Secretary of the Interior, showing that the said application is now pending before the Secretary of the Interior; which letter is marked "Defendants' Exhibit No. 15."

24. The court erred in the rejection of the evidence offered by the defendants in rejecting and excluding all of the said testimony so offered by the defendants in the certified records and documents marked "Defendants' Exhibits No. 4 to 15, inclusive."

25. The court erred in the rejection of the evidence offered by the defendants in rejecting and excluding the certified copy of the inventory of the real estate in Wisconsin of the estate of Eber B. Ward; which certified copy is marked "Defendants' Exhibit No. 18."

26. The court erred in the rejection of the evidence offered by the defendants in rejecting a certified copy of Schedule G of the inventory of the estate of Eber B. Ward and marked "Defendants' Exhibit No. 19."

27. The court erred in the rejection of the evidence offered by the defendants in rejecting a certificate of the proper officer, duly authenticated, in charge of the records in Michigan, in the matter of the estate of Eber B. Ward, that he has made examinations of the record of the probate court of the county of Wayne, State of Michigan, and that the following pieces of land or any part or portion thereof, viz:

Blocks 175 to 195, inclusive, in the third ward, in the city of Milwaukee, Milwaukee county, Wisconsin, and fractional section thirty-three (33), in township seven (7) north, of range twenty-two (22) east, in the State of Wisconsin, do not appear in the inventory of the estate of Eber B. Ward, deceased, and that said land has not been disposed of by any order of said court, and which certificate, duly authenticated, is marked "Defendants' Exhibit No. 20."

28. The court erred in using the following language in the charge to the jury: "In accordance with the suggestions of the court, gentlemen, at the time when we closed on Friday, it is the conclusion of the court that the record testimony produced by the plaintiff shows clearly a record title in the plaintiff to the property in question."

29. The court erred in using the following language in the charge to the jury: "That is, it appearing that the plaintiff was vested with the fee of the blocks of land on each side of the street in question, it became vested with the title to the center of the street on each side, and therefore becomes vested with the fee of the whole property."

30. The court erred in using the following language in the charge to the jury: "The plaintiff, as I understand the proof, has shown the title from the Government to all except a very small fraction, and as to that fraction it has been covered by tax deed."

31. The court erred in using the following language in the charge to the jury: "So that upon the record here, undisputedly, the plaintiff is vested with the title to this property."

32. The court erred in using the following language in the charge to the jury: "The defendant has offered nothing."

33. The court erred in using the following language in the charge to the jury: "He entered a little less than six years ago upon this property, put up his shanty as a squatter—as an intruder, as the law names it—without any right or claim."

34. The court erred, after it had stated as follows: "It is true, gentlemen, that a man, no matter what entry he makes, may stand in an action of this kind upon this position: that if the plaintiff fails to show in an action of ejectment a title he may take the benefit of that—take the advantage of it," in thereafter stating in the next sentence and in using the following language in the charge to the jury: "That cannot apply to this case, because, as I have already stated, the plaintiff has shown the record title."

35. The court erred, after it had stated to the jury, "Counsel for the defendant has attempted to introduce here evidence to show that the Government title under which this plaintiff claims was void; that by reason of certain treaties and certain other matters asserted

by him no title is shown in the plaintiffs," in thereafter, in the next sentence, stating to the jury and in using the following language in the charge to the jury: "You are instructed, gentlemen, upon that point that this defendant is in no position to urge any such defense, if there were such a defense existing at the time."

36. The court erred in using the following language in the charge to the jury: "A title obtained from the Government is the highest muniment of title, and it is not permitted that it be assailed by any one except the Government or some one claiming under the rights of the Government."

37. The court erred in using the following language in the charge to the jury: "Aside from that, a patent from the Government is invulnerable."

38. The court erred in using the following language in the charge to the jury: "Of course, the responsibility of this verdict is with the court on that matter, but it is for you to put it in form by a verdict."

39. The court erred in directing the verdict for the plaintiff against the defendants.

Wherefore the defendants pray that a writ of error from the Supreme Court of the United States may issue to the United States circuit court for the eastern district of Wisconsin, and further pray that the Supreme Court of the United States will reverse the said judgment of the circuit court of the United States for the eastern district of Wisconsin, and that the said defendants may be restored to all things which they have lost by occasion of the said judgment.

Dated this 3rd day of December, A. D. 1897.

RUBLEE A. COLE,
Attorney for Defendants.

Endorsed: Filed December 4, 1897. Edward Kurtz, clerk.

No. 560.

By. of Carter 560

Office Supreme Court U. S.
FILED.
FEB 23 1898
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

Filed Feb. 3, 1898.

JOHN BUDZISZ AND AUGUST BUDZISZ, (ALIAS) ANASTAZIUS BUDZISZ,

Plaintiffs in Error,

vs.

ILLINOIS STEEL COMPANY,

Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

WILLIAM E. CARTER,
ELBERT H. GARY,
Counsel for Defendant in Error.

BRIGGS, HINSHAW & ALLEN, PRINTERS, CHICAGO.

SUPREME COURT OF THE UNITED STATES.

JOHN BUDZISZ AND AUGUST BUDZISZ, (ALIAS) ANASTAZIUS BUDZISZ,

Plaintiffs in Error,

vs.

ILLINOIS STEEL COMPANY,

Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

It plainly appears from the assignments of error, as well as from the record, that, unless it can be made to appear, as is claimed in assignment No. 1, "that there was a denial of rights claimed under treaties of the United States," no question arises or has arisen in the case to bring it within any of the clauses, subdivisions or provisions of Section 5 of the Act of March 3rd, 1891, establishing Circuit Courts of Appeals. And, therefore, this Court has no jurisdiction to review the judgment of the Circuit Court.

Whether then, the validity or construction of any treaty, made under the authority of the United States, was or is drawn in question in this case, is the sole question that arises upon the present motion.

And respecting this question, as there is no bill of exceptions bringing up the proceedings at the trial resulting in the judgment sought to be here reviewed, the Court having re-

to, were surveyed in 1834, and were offered for sale "by the President by his proclamation dated the sixth day of May, 1835."

It is further alleged that as to the lands involved in this action, situated in Milwaukee County, the title was in the Indians and had not been extinguished on the 29th day of May, 1830; that they were conveyed to the United States by the treaties above referred to. That they were surveyed "in the first quarter of 1835," and were offered for sale by the President May 6th, 1835. That the tract in Brown County, above referred to, containing 41.80 acres, was entered at the United States Land office at Green Bay, Michigan Territory, July 30th, 1835, by Increase Claflin and Daniel Darnell under the pre-emption act, 1834," and patented by the United States September 1st, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell.

It is alleged "that any pretended claim of title on the part of the Plaintiff to the lands in question is derived from a purported entry as a 'float' or 'floating right,' on July 30th, 1835, at Green Bay Land Office by one Daniel Darnell."

It is also alleged that the lands were patented April 16th, 1838, by the United States to Albert G. Ellis, assignee of Daniel Darnell.

It is not explicitly so stated, but we infer from the statements of the answer, that the pleader meant to allege, that the "float" or "floating right," by means of which Darnell entered these lands, was issued to him by the officers of the Green Bay Land Office by reason of the fact, that the joint pre-emption entry of Claflin and Darnell was of only 41.80 acres, so that, if that entry were valid, each of those men would, under the law as it then was, be entitled to a "float" or "floating right" to purchase and pay for a specified quantity of other public lands situated in the same Land District. That it was by means of such a "float" so issued that Darnell entered these lands.

It is alleged that the joint pre-emption entry by Claflin and Darnell of the tract in Brown County was "wholly void

and insufficient, and lacked the essential ingredients both in law and fact, both in the matter of residence and occupation under and by virtue of the several laws of the United States to authorize Increase Claflin and Daniel Darnell, or either or any of them to have, hold or locate any of the public lands of the United States as a 'float' or as a 'floating right,'" etc. And that, because such pre-emption entry was void for want of compliance with the laws of the United States, respecting residence, etc., the entry of these lands by Darnell under a floating right issued to him based upon that pre-emption entry, together with the patent issued to Ellis as assignee of Darnell, were also wholly void, and the prayer is that both the Brown County entry and the patent based thereon, and the Milwaukee entry and the patent based thereon, be cancelled and set aside.

It seems to be quite clear that this presents no question involving the validity or the construction of any treaty. The invalidity of the entries and the patents, if they were invalid, does not arise from any breach of the terms of any treaty, but from failure on the part of Claflin and Darnell to comply with the laws of the United States respecting pre-emptions and "floats," and the failure of the officers of the local Land Office to require such compliance before permitting the entry, and of the General Land Office in not requiring such compliance before issuing the patents.

It is conceded that the lands in question were offered for sale as public lands of the United States, by the proclamation of the President May 6th, 1835, and were entered at the proper Land Office on the 30th of July of the same year. It is also conceded that, at that time, all rights of the Indians to these lands, including the right to hunt and fish granted to them by the treaty of February 8th, 1831, were terminated. The most that can be made of the allegations of the answer is, that the officers of the Land Office were mistaken as to the laws of the United States respecting pre-emptions, or were deceived as to the facts upon which the pre-emption claims were based. There is no provision in any treaty with the

Menomonee Indians respecting or regulating pre-emption rights or claims. They arise, if they arise at all, under the laws of the United States, and their validity must be determined by those laws, and not by the terms of any treaty. So that, conceding that the Land Officers erred in permitting the pre-emption entry to be made, and in permitting the entry to be made under a "float" based upon such pre-emption entry, and in issuing the patents, either because they misconstrued the laws of the United States respecting pre-emptions, and accepted in consequence, as sufficient proof of entry, residence and occupation, to entitle the claimants to a pre-emption right, proof of such entry, occupation and residence made and done at a time when the lands were not subject to entry, occupation and residence under the pre-emption laws, or because they were deceived by the claimants as to what the facts were, in either case the error did not arise from the terms of any treaty, but from a misconstruction of, or a fraud perpetrated upon, the pre-emption laws of the United States.

If it were conceded, for the purpose of argument, that the lands were not open to pre-emption, even, at the time of the entry of them in July, 1835, or even that they were not then subject to entry, and that the patent for that reason is void, that would not result from the terms of any treaty, but from the laws of the United States. It is by those laws and not by the terms of any treaty that the question whether lands are subject to pre-emption, or to entry or sale, is to be determined.

This is so entirely clear, as it seems to us, and so completely demonstrates that any question arising in this case affecting the entry and conveyance of the government title to these lands, is a question arising under the laws of the United States and depending simply upon their proper interpretation and not under any treaty, that we might, we think, well end the discussion of this motion at this point.

But if the view just stated is incorrect, it still remains true that no question involving the validity or construction of

any treaty arises in this case, as we will proceed to demonstrate.

Courts take judicial notice of treaties.

U. S. v. Rauscher, 119 U. S., 407.

Of a geographical fact.

United States v. La Vengeance, 3 Dall., 297.
The Peterhoff, Blatch. P. C. (U. S.), 467.
[19 Fed. Cases on p. 343.]
The Apollon, 9 Wheat., 362.
Peyroux v. Howard, 7 Pet., 324.
U. S. v. Lawton, 5 How., 10, 15.

Of laws defining the limits of a city, Griffing v. Gibb, 2 Black 519.

Of the streets in a city, their relation to each other and the direction in which they run.

Brady v. Page, 59 Cal., 52.

Of changes in cities.

Brumagim v. Bradshaw, 39 Cal., 24.

Of the location of incorporated towns.

People v. Suppiger, 103 Ill., 434.

Courts also take judicial notice of the surveys of the public lands.

Atwater v. Schenck, 9 Wis., 160.
Prieger v. Insurance Co., 6 Wis., 89.
Hill v. Bacon, 43 Ill., 477.
Peck v. Sims, 120 Ind., 345, and cases there cited.

And of other public surveys made by the government.

Wright v. Phillips, 2 Greene, (Iowa) 191.
Hypfner v. Walsh, 3 Greene, (Iowa) 509.

That a public, navigable river, has been obstructed in cities and villages by bridges, buildings, and mill-dams, until it has ceased to be navigable in fact.

State vs. Carpenter, 68 Wis., on p. 170.

The Court will also take notice of the character of this land, that it is unfit for agricultural purposes, and is, in fact, part of the City of Milwaukee.

***Ex parte* Davidson, 57 Fed. on p. 887.**

The Court will therefore take notice that lots one and two of fractional section thirty-three, town seven north of range twenty-two East of the fourth principal meridian, constituted, when surveyed and sold by the United States, a long narrow slip consisting mainly of sand bank and marsh, one mile in length from north to south, lying on the lake front of the City of Milwaukee, almost exactly at the point of the deepest indentation of the bay of Milwaukee into the land, and almost exactly midway between the northern and southern extremities of the bay. That they lie on the east side of the Milwaukee River and between that river and Lake Michigan, the line dividing lot one from lot 2 being the center line of the section, that when they were surveyed by the United States, offered for sale, sold and patented, the southernmost end of lot 2 formed the north bank of the Milwaukee River, which at that point turned from its former northwesterly and southeasterly course and flowed eastward into Lake Michigan. That it was at that time extremely narrow at its southerly end, which was about 8 or 10 rods south of the section line of section 33, being at that point and for nearly 30 rods northward, not more than 8 to 10 rods wide. That owing to the character of the soil the shape of lot two, especially, was subject to great change, so that when the survey and map or plat in the partition judgment dividing the lots into lots, blocks and streets, which was introduced in evidence at the trial, were made in 1846, the southerly end had moved northward to a point somewhat north of the section

line and had become nearly or quite 450 feet wide. That at the time of the first survey, as well as in 1846, at a point about midway between the center line of the section and its south line, lot two broadened to a width of more than a thousand feet and narrowed again, so that at the center line of the section it was less than 400 feet wide. At a point a short distance south of the center of the section, an inlet or bayou entered the northwesterly face of lot 2, flowed in a southerly direction and reached the river again at a distance of 80 to 90 rods from the point of entry. This was navigable all the way for boats, and at the northern end, it had become in 1846, nearly 300 feet wide and deep enough to shelter good sized vessels, as vessels then were upon the lakes.

The portion of lot 2 west of the bayou was therefore an island, upon which a man named Jones had a ship yard, and from that circumstance the island was called "Jones Island," and now all of lot 2 is called "Jones Island."

In 1857 the City of Milwaukee finished the work of cutting through lot 1 at a point a short distance north of the center of the section, a new outlet for the river, commonly called "The Straight Cut." The effect of this was that easterly storms washed sand and gravel in from the lake, and in a short time filled up the bayou above spoken of, and made it firm ground, and also filled up the old mouth of the river, so that that also is now firm ground, and connects lot 2 with the mainland south of the old river mouth.

There is not and never has been any bridge connecting lot 2 with the City of Milwaukee, and the only means of access to it is by boat, except that it can be reached from the southward by passing over the old river bed. But that involves a long circuitous trip around slips, canals and other bodies of water which prevent access to the land south of lot 2, except by means of a long detour.

Lot 1 is almost solidly built over with large and expensive buildings, manufactories, warehouses and other buildings. The Milwaukee Gas Company's entire plant, and a large malting establishment stand upon it, and a line of ware-

houses almost solidly occupies its river front. The Milwaukee round-house, other buildings and part of the yards of the Chicago & Northwestern Railway Co. are upon it. Lot 2 is occupied by nearly 200 families, nearly all of whom are "squatters," and a large proportion of them are fishermen, and came from Germany directly to Jones Island, though many of them have in the past paid rent for their holdings to the owners of the soil, and some now do so.

Some time since certain wise newspaper men advised those people not to pay rent or sign leases until they knew who owned the land. The result has been, as is notorious in Milwaukee at least, that the officers of the law who have gone there seeking to serve process or papers have been mobbed and driven off. Scalding water and red pepper have been used upon them, and the law was for a long time successfully defied.

Under those circumstances this suit was brought, the Plaintiff being an Illinois corporation, and the value of the land occupied by the Defendants being ample to give the Court jurisdiction. The trial in the Circuit Court resulted in a verdict for the Plaintiff, directed by the Court.

In Beecher v. Wetherby, 95 U. S. on p. 525, this Court pointed out that the boundaries of the lands claimed by the Menomonee tribe of Indians were settled by treaty in 1825 (7 Stat. at Large, 272), and that the same boundaries were recognized by the subsequent treaty of 1831. (7 Stat. at Large, 342.)

The last named treaty was ratified by the Senate June 25th, 1832, except as to some provisions respecting the New York Indians, which do not affect these lands,and was proclaimed by the President July 9th, 1832. As to the provision for the New York Indians, a subsequent treaty was made October 27th, 1832, and proclaimed by the President March 13th, 1833. (7 Stat. at Large, 405.)

By the third article of the treaty of 1831, the Menomonees, "for the purpose of securing to themselves and posterity a comfortable home, hereby cede and forever relinquish

to the United States all their country on the southeast side of Winnebago Lake, Fox River and Green Bay, which they describe in the following boundaries, to-wit: Beginning at the south end of Winnebago Lake and running in a southeast direction to Milwauky or Manawauky River, thence down said river to its mouth; thence north along the shore of Lake Michigan to the entrance of Green Bay; thence up and along Green Bay, Fox River and Winnebago Lake to the place of beginning."

By the fourth article certain lands, not including, however, any lands south or east of the Fox River, were set apart to the Menomonees as a reservation, and provision was made for teaching them farming and housewifery, and allowing them an annuity, and ten thousand dollars in clothing, provisions and specie, was to be paid to them in six months from the date of the treaty. The object of the reservation and annuity being declared to be for the purpose of "weaning them from their wandering habits, by attaching them to comfortable homes," etc.

By article six it was agreed that the lands described in the treaty as part of the Menomonee lands lying west of Fox River, except the part ceded to the New York Indians—so-called—and their own reservation, "the Menomonees claim as their country," and would remain to them as theretofore for a hunting ground, "until the President of the United States shall deem it expedient to extinguish their title," and they promised that they would surrender it immediately upon being notified of the desire of the government to possess it. And they did cede it by the treaty of 1848.

The cession of all right or claim of right on the part of the Menomonees to the lands included within the boundaries above quoted was absolute, and took effect at the latest on July 9th, 1832, when the President's proclamation was issued.

There is not a word in the treaty which in any way restrains or prevents the public land laws of the United States from immediate application to the lands ceded, or in the least

limits their operation upon them. And without doubt, from the moment the President's proclamation was issued, the ceded lands became public lands of the United States, subject to survey, entry and sale as other public lands, and completely subject to the land laws of the United States then existing or thereafter enacted, and to the control of the Land Department of the Government.

It is our understanding, however, that the claim of the counsel for the Plaintiffs in Error, that the validity or construction of a treaty is involved, rests upon the first clause of the sixth article, which grants to the Indians the "liberty to "hunt and fish on the lands they have now ceded to the "United States, on the east side of Fox River and Green "Bay, with the same privileges they at present enjoy, until it "be surveyed and offered for sale by the President; they con-"ducting theselves peaceably and orderly."

But there is in that language no restraint or restriction upon the rights of the United States or its citizens to the lands. On the contrary, it recognizes in the most explicit manner the complete extinction of all Indian rights, except the right to hunt and fish upon the lands during the pleasure of the President. That the lands were to be surveyed while their right to hunt and fish continued to exist is expressly recognized, and that the lands would also be open to settlement is impliedly recognized by the condition that the Menomonees must conduct themselves "peaceably and orderly." That is to say, they might hunt and fish so long as they did not molest those who, under the laws of the United States, might enter or settle upon the lands.

But should it be conceded that the right to hunt and fish upon them operated, while it existed, to prevent the lands from becoming public lands of the United States, and subject to its land laws, it is conceded by the answer of the Plaintiffs in Error that the land on the bank of the Fox River, which was jointly entered under the pre-emption laws by Claflin and Darnell, was surveyed in 1834, and that the lands here in question were surveyed in the first quarter of 1835,

and all of them were offered for sale by the President by his proclamation, dated May 6th, 1835, so that on that day, if not before, the right of the Indians even to hunt and fish was absolutely at an end. The lands were then, if not before, public lands of the United States, in the control of its Land Department and subject to entry, sale and conveyance under its land laws, as other public lands were.

It is entirely certain that after May 6th, 1835, no treaty whatever stood in the way of complete control by the General Land Office over these lands, and over the sale and conveyance of them.

Whether the actual sale and conveyance of them was in accordance with law is, as we said above, a question which depends upon the proper interpretation of the laws of the United States upon the subject, and not upon the terms of any treaty, and therefore no question arises which enables this Court to take jurisdiction of the case.

But even if the question were one of which the Court could take jurisdiction, that is, if the Court could take jurisdiction of a question arising under the laws of the United States, it is certain that the entry and conveyance of the lands in question were in strict conformity with the public land laws of the United States, as an examination of those laws as applied to the facts as stated in the answer, will readily show.

We have not been able to find that any Act of Congress respecting pre-emptions, prior to the Act of May 29th, 1830 (4 Stat. at Large, p. 420, ch. 208), was permanent in character or general in application. They were all local and temporary. The Act of May 29th, 1830, while general in scope, was limited in its operation to one year from its passage, and applied only to those who were then in possession of public lands, and had cultivated part of them in 1829.

Section 2 of that Act provides, "That if two or more per-"sons be settled upon the same quarter section, the same may "be divided between the two first actual settlers, if, by a north "and south, or east and west line, the settlement or improve-

"ment of each can be included in a half quarter section; and in "such case the settlers shall each be entitled to a pre-emption "of eighty acres of land elsewhere in said land district, so as "not to interfere with other settlers having a right of prefer- "ence."

By section 3 of the same Act it was provided that, "All "assignments and transfers of the right of pre-emption given "by this Act, prior to the issuance of patents, shall be null and "void."

This Act expired by its own limitation in May, 1831. But, nevertheless, Congress passed an Act, which was approved January 23rd, 1832 (4 Stat. at Large, p. 496, ch. 9), to the effect that from and after its passage all persons who had purchased under the Act of May 29th, 1830, might assign and transfer their certificates of purchase, or final receipts, and patents might issue in the name of such assignee, anything in the Act aforesaid to the contrary notwithstanding.

By Act of Congress, approved July 14th, 1832, (4 Stat. at Large, p. 603, ch. 246), it was provided that where those who were entitled to pre-emption under the Act of May 29th, 1830, had not been or should not be enabled to make proof and entry of the same within the time limited, in consequence of the public surveys not having been made or returned, or where the land was not attached to any land district, etc., such persons might enter the same within one year after the removal of the disability which prevented the entry.

This Act, it will be seen, was passed after the President's proclamation of July 9th, 1832, announcing the ratification of the treaty of February 8th, 1831, and applied, without the shadow of a doubt, to the lands ceded by that treaty.

This Act is entitled "An Act supplemental to the act" of May 29th, 1830. By section 2 it was provided, "That the "occupants upon fractions shall be permitted, in like manner, "to enter the same, so as not to exceed in quantity one quar- "ter section; and, if the fractions exceed a quarter section, the "occupant shall be permitted to enter one hundred and sixty

"acres, to include his or their improvement, at the price afore-"said."

As no price for the public lands is named in the Act of July 14th, 1832, the words "at the price aforesaid," there used, relate of necessity back to the Act of May 29th, 1830, to which it is declared to be supplemental, and refer to the words, "the then minimum price of said lands," found in section 1 of that Act.

We cannot find that any other Act of Congress affects the question until the Act of June 19th, 1834, (4 Stat. at Large, p. 678, ch. 54), entitled "An Act to revive the act entitled 'An act to grant pre-emption rights to settlers on the public lands,'" approved May 29th, 1830.

By section 1 of this Act it was provided, "That every set-"tler or occupant of the public lands, prior to the passage of "this act, who is now in possession, and cultivated any part "thereof, in the year one thousand eight hundred and thirty-"three, shall be entitled to all the benefits and privileges pro-"vided by the act entitled 'An act to grant pre-emption "rights to settlers on the public lands,' approved May 29th, "1830; and the said act is hereby revived and shall continue "in force two years from the passage of this act, and no "longer."

This Act, as it revived the Act of May 29th, 1830, and those persons coming within its provisions were declared to be entitled to all the benefits and privileges provided by that Act, of necessity therefore revived and continued that portion of the Act which entitled each of the two pre-emptors of the same quarter section, which, of course, includes any fractional tract less than a quarter section, to a pre-emption right to enter or purchase another eighty acres of land in the same land district, which did not interfere with other settlers having a preference. The right to such a pre-emption or "float" then, survived and existed by law, leaving the Land Office to decide in each case, whether the necessary facts existed to bring the case within the operation of the law.

Almost immediately after the passage of that Act, the

question arose in the Land Office, what was revived by it, whether it revived the Act of May 29th, 1830, as it originally stood with the prohibition against assignments and transfers of the right of pre-emption given by it, including the right to transfer or assign "floats," or whether it revived that Act as amended by the Act of January 23rd, 1832, striking out that prohibition?

The Attorney General (Butler), gave it the latter construction, and this Court, in Marks v. Dickson, 20 How. 501, gave it the same construction.

It is admitted in the answer (fols. 11 and 12), that Claflin, with his family, occupied and lived in a good dwelling house upon the fractional tract on the bank of the Fox River, from the year 1832 to about May 10th, 1835, and cultivated part of the tract in the years 1833 and 1834, and was so living and occupying the tract on June 19th, 1834, at the passage of the Act of Congress above referred to, so that, if the lands were then, under the laws of the United States, subject to pre-emption, he was strictly within the letter of that Act. It is also admitted (fol. 13), that Daniel Darnell also occupied and cultivated a part of the same tract in 1833 and 1834, and was residing there on June 19th, 1834, so that he also was within the letter of that Act.

That these lands, including the fractional tract on the bank of the Fox River, were part of the "Public Lands," of the United States, and as such subject to pre-emption after the ratification of the treaty of February 8th, 1831, and the proclamation of the President, July 9th, 1832, cannot be doubted. The Milwaukee lands fell within a belt of lands which were claimed both by Massachusetts and Virginia. The rights of Virginia to them were ceded by that State to the United States, March 1st, 1784, and those of Massachusetts were ceded by that State, April 19th, 1792. Great Britain, in 1783, ceded to the United States all rights to the lands which she had not theretofore conveyed to Massachusetts or Virginia.

For the claim of Massachusetts and her cession, see "The

Public Domain With Statistics," pp. 36, 71, 87. For Virginia, ibid pp. 33, 87. For Great Britain's rights to them and her cessions of them, ibid pp. 1, 241.

From these cessions the United States became possessed of the absolute fee of the lands, which the Indians never possessed, but had simply a right to occupy them until they were wanted for improvement and settlement, and when that was or should be was solely determined by the United States.

Johnson v. McIntosh, 8 Wheat., 543.
Beecher v. Wetherby, 95 U. S., 517.
U. S. v. Cook, 19 Wall., 591.

In this last named case the Court said on p. 593, "The "right of the Indians to their occupancy is as sacred as that "of the United States to the fee, but it is only a right of occu- "pancy. The possession, when abandoned by the Indians, "attaches itself to the fee without further grant.

"The right of the United States to dispose of the fee of "the lands occupied by them, i. e., 'the Indians,' has always "been recognized by this Court from the foundation of the "government. It was so ruled in Johnson v. McIntosh, 8 "Wheat. 543, in 1823, and in United States v. Cook, 19 Wall, "591, in 1873. Other cases between those periods have "affirmed the same doctrine.

"Clark v. Smith, 13 Pet., 195

"See also

"Jackson v. Hudson, 3 Johns., (N. Y.) 375.
"Veeder et al. v. Guppy, 3 Wis., 502, and
"8 Opin. Atty. Gen., pp. 262, 264."
Beecher v. Wetherby, 95 U. S., on p. 525.

See also

Buttz v. Northern Pacific R. Co., 119 U. S., on p. 67.
U. S. v. Rogers, 4 How., 567.
Spalding v. Chandler, 160 U. S., 394, 402.

It is entirely certain that the lands in question were public lands of the United States, as well before the treaty of February 8th, 1831, as afterwards, in the sense that they were owned by the United States, and that a grant or conveyance of them by the United States would vest the fee of them in the grantee, subject, however, if the grant or conveyance was previous to the cession of the Indian right of occupancy, to such right until it was extinguished by cession or otherwise, as the United States should prescribe.

But though they were public lands of the United States, it would not necessarily follow that they were subject to the control of the Land Department, or to pre-emption, entry or sale under the land laws, prior to the termination of the Indian right of occupancy. It is said: ("The Public Do-"main with Statistics," p. 240), that "From the organization "of the National Government, it has been the rule of the "Nation to purchase the occupancy right from the Indians, "generally giving them more value in the compensation than "the use of the ceded lands is worth to the Indians. The "Government has never attempted to survey and dispose of "lands prior to their cession by the Indians."

By the first section of the Act of 1830, it was provided that every settler or occupant of the public lands, etc., "who "cultivated any part thereof, etc., was authorized to enter by "legal subdivisions, any number of acres, not more than one "hundred and sixty, to include his improvement, upon paying "to the United States the then minimum price of said land." The only restriction in that section limiting the public lands to which the Act was intended to apply, is in this proviso. "Provided, however, that no entry or sale of any land shall "be made under the provisions of this Act, which shall have "been reserved for the use of the United States, or either of "the several States, in which any of the public lands may be "situated."

Section 4, however, enlarges somewhat upon the restrictions upon pre-emptions, not so much perhaps respecting the lands to which the Act was applicable, as to the time and

manner in which the rights granted by it must be claimed and proved. It plainly recognizes, as within its scope, lands which had not then been offered for sale. Then follows this clause: "Nor shall the right of pre-emption, contemplated "by this Act, extend to any land which is reserved from sale "by Act of Congress, or by order of the President, or which "may have been appropriated for any purpose whatsoever."

Now it is not claimed that these lands were reserved for the use of the United States, or either of the several States. Nor is it claimed that they were reserved from sale by Act of Congress or by order of the President, or that they had been appropriated for any purpose whatsoever. As the Indian right of occupancy of these lands had been extinguished by the treaty of February 8th, 1831, so that the right of actual occupancy and possession, as well as the fee title had thus become vested in the United States and its citizens, they were public lands of the United States, and subject to its land laws within all the definitions of the term "Public Lands," which we have been able to find. And as they did not fall within any of the classes of lands excluded from the operation of the Act of May 29th, 1830, they clearly were subject to pre-emption by its terms and the terms of the Acts reviving it.

The Act of January 23rd, 1832 (4 Stat. at Large, 496), does not affect the question of what lands might be pre-empted. It simply repealed the clause contained in the Act of 1830, prohibiting any assignment or transfer of the right of pre-emption prior to the issuance of the patent, and permitted the transfer of the certificates of purchase or final receipts, and directed that patents might issue in the name of the assignee.

The Act of July 14th, 1832 (4 Stat. at Large, 603), removed some of the restrictions imposed by the Act of 1830, upon pre-emptions, but none that, so far as we can see, apply here, unless it may be that as these lands, as is claimed in the answer, had not then been surveyed, and perhaps had not been assigned to any land district, proof of entry and cultivation could not at that time be made. One concession to the

pre-emptor was in terms made by that Act, which was not in terms contained in the Act of 1830, and which was applicable here. It expressly provides that occupants of fractions might enter them, and it will be remembered that the joint entry of Claflin and Darnell on the bank of the Fox River was of a fraction. The gentleman who drew the answer seems to have thought that because it was a fraction it was not subject to pre-emption. (Fols. 6 and 7.)

The Act of June 19th, 1834, (4 Stat. at Large, 678), revived the Act of 1830, and removed still more of the impediments to entries under that Act without adding any new ones.

So that we respectfully submit, that the action of the General Land Office, in permitting Darnell to enter these lands by means of the "float," to which he became entitled by means of his joint pre-emption with Claflin, of the tract on the bank of the Fox River, was in strict conformity with the land laws of the United States.

We do not deny that this Court has power, in a proper proceeding and between proper parties, to inquire and determine whether the proceedings of the Land Department have been in accordance with law. But we respectfully submit, that this Court has no power or jurisdiction to inquire, in a collateral proceeding, such as this is, whether that Department erred or was deceived respecting the facts upon which the entry and conveyance were made.

Both of the propositions just stated are so well known and so conclusively settled by authority, that time will not be wasted in citing cases in support of them.

II.

But there is still another reason why this Court has no jurisdiction of the present writ of error, and would have none, even though the validity or construction of a treaty were drawn in question.

And that is, that the Plaintiffs in Error claim no rights

under any treaty, and do not even attempt to connect themselves with any one who does claim rights under a treaty, if there were any such person. They are almost exactly in the same position with the defendant in Owings v. Norwood's Lessee, 5 Cranch, 344. Like the defendant in that case, while asserting no rights themselves under any treaty, and being, as the defendant in that case was, absolute strangers to the title of the lands, which they admit they occupy without any claim or pretense of right, they seek, as the defendant in that case sought, to thrust in the way of the Plaintiff's right of recovey an alleged treaty, which they say is involved, and under which they say somebody else has rights (in that case Scarth, the Englishman, or his heirs, in this case the United States.) We submit that the United States is quite able, without the assistance of the Plaintiffs, to assert and maintain its rights to these lands, if it has any.

While it is true that in the Owings case the question of jurisdiction depended upon the proper construction of the 25th section of the Judiciary Act, yet the reasoning of Chief Justice Marshall in that case is just as applicable to this. He said: "The twenty-fifth section of the Judiciary Act "must be restrained by the constitution, the words of which "are, 'All cases arising under treaties.' The Plaintiff in "Error does not contend that his right grows out of a "treaty." On the next day he said it was not the meaning of the decision that the Court could not revise the decisions of the State courts as to the construction of a treaty, when that question arose incidentally, and added: "The reason "for inserting that clause in the constitution was, that all per-"sons who have real claims under a treaty should have their "causes decided by the national tribunals. It was to avoid "the apprehension as well as the danger of state prejudices. "The words of the constitution are, 'cases arising under "treaties.' Each treaty stipulates something respecting the "citizens of the two nations, and gives them rights. Whenever "a right grows out of, or is protected by a treaty, it is sanc-"tioned against all the laws and judicial decisions of the States;

"and whoever may have this right is to be protected. But if "the person's title is not affected by the treaty, if he claims "nothing under a treaty, his title cannot be protected by the "treaty. If Scrath or his heirs had claimed it would have "been a case arising under a treaty. But neither the title of "Scarth, nor of any person claiming under him, can be "affected by the decision of this cause."

The same provision of the constitution is the measure of the jurisdiction meant to be conferred on this Court by section 5 of the Act of March 3rd, 1891, as of that conferred by the twenty-fifth section of the Judiciary Act, and by section 709 U. S. Revised Statutes, which, as this Court held in Long v. Converse, 91 U. S. 105, means substantially the same as the twenty-fifth section of the Judiciary Act. And practically the same limit to the jurisdiction of this Court is prescribed in all three sections, because that limit is prescribed by the constitution.

A case under a treaty must arise to give this Court jurisdiction under either statute, and the test, whether it "arises" or not, must be the same under each of them. It is true that section 709 R. S., as well as section 25 of the Judiciary Act, go into greater detail in describing the classes of cases that may be removed from the state courts into this Court than section 5 of the Act of 1891. But it is submitted that it could not have been the purpose of Congress, in the latter Act, to give this Court jurisdiction in cases where, according to its own interpretation of the constitution, it did not have jurisdiction before, but to provide that certain of the cases of which, before that Act it did have jurisdiction, might be removed from the trial court directly to this Court without first passing through the Circuit Court of Appeals.

It certainly was not the purpose of the Act to change the test by which the courts determine whether a case arises under a treaty, so as to give jurisdiction over it to the courts of the United States.

The rule laid down in Owings v. Norwood's Lessees has

been followed and approved by this Court in many cases, among which are:

Fisher v. Cockerell, 5 Peters, 256-7.
Crowell v. Randall, 10 Peters, on p. 392.

In Hickie v. Starke, 1 Peters on p. 98, the same rule was adopted, though we do not find that Owings v. Norwood was cited by the Court.

The same rule was approved in

Montgomery v. Hernandez, 12 Wheat., 129.
Fulton v. McAffee, 16 Peters, 149.
Udell v. Davidson, 7 How., 769.
Henderson v. Tennessee, 10 How. on p. 323.
Wynn v. Morris, 20 How., 3.
Hale v. Gaines, 22 How., 149, 160.
Verden v. Coleman, 1 Black, 472.
Long v. Converse, 91 U. S., 105.
Miller v. Lancaster Bank, 106 U. S., 542.
Giles v. Little, 134 U. S., 645.

All of the foregoing cases arose under the twenty-fifth section of the Judiciary Act, or under section 709 R. S.

But the case of United States v. Old Settlers, 148 U. S. 427, did not. That was an appeal from the Court of Claims. And on p. 468 the Chief Justice, in delivering the opinion of the Court, used this language: "As a case arises "under the constitution or laws of the United States, when- "ever its decision depends upon the correct construction of "either, Cohens v. Virginia, 6 Wheat. 264, 379: Osborne "v. Bank of the United States, 9 Wheat. 737, 824, so a case "arising from or growing out of a treaty is one involving "rights given or protected by a treaty. Owings v. Nor- "wood's Lessee, 5 Cranch, 344, 348." Fully sustaining, we think, our contention, that the test for determining whether or not a question in a case arises under a treaty, so as to give the courts of the United States jurisdiction under the

clause of the constitution quoted in Owings v. Norwood's Lessee, is the same, whether it arises under the twenty-fifth section of the Judiciary Act, under section 709 R. S., or otherwise.

Without further elaboration of the discussion, we submit, that plainly in this case neither the validity nor the construction of any treaty made by the United States or under its authority is in any way "drawn in question." Especially is no such question raised by any person claiming any right, benefit or immunity under any such treaty. And no other question arises which by the terms of section 5 of the Act of 1891 permits this case to be taken directly to this Court instead of the Circuit Court of Appeals.

Attention may properly be called to the extraordinary position of the Plaintiffs in Error in this case. They admit by their answer that they are, and have been since 1891, in possession of the land in question, which they admit is part of the land patented by the United States to A. G. Ellis nearly 60 years ago. They do not pretend that they have any right to such possession, or to connect their possession with the United States, the Indians, or any other claimant of the title. They simply deny that they unlawfully withhold possession from the Plaintiff below, because, they say, the Plaintiff is not the owner in fee-simple, or entitled to the possession. As the Plaintiff in ejectment must recover, if at all, on the strength of his own title, or upon a previous actual possession unlawfully invaded by the Defendant, the Plaintiff in this case was obliged, in order to recover, to prove that it had such title and right of possession. So far as the answer contains such general denials, and thereby put the Plaintiff to the production of such proofs, it was not stricken out nor sought to be.

But the gentleman who drafted the answer seems to have imagined that under the law, the Court, at the request or suggestion of mere trespassers, utter strangers to the title, in order to assist them in retaining possession of a small part of the 77.70 acres of lots 1 and 2, section 33, town 7, range 22

East, which they do not claim to own, or to have ever bought or paid for,without any of the parties whose title is thus to be destroyed, except the Plaintiff in this case before it, will not only cancel, annul and wholly set aside the patent issued nearly 60 years ago to those two lots, but will also cancel, annul and set aside the patent to the fractional forty odd acre lot on the bank of the Fox River in Brown County, Wisconsin, respecting which lot there is no party whatever before the Court. And this, when the only party to be benefited by such action by the Court would be the United States. Because judgment that the title is in the United States, would be equivalent to judgment that these Plaintiffs in Error have no title, or right of possession as against the United States.

And this also, although more than 60 years ago, the United States sold all of those lands, received and has ever since retained the money paid for them, and nearly 60 years ago patented them, and has never since disclosed, so far as it appears, the slightest dissatisfaction with its bargain, or sought to rescind it, if it could.

It would indeed be a most extraordinary thing if to protect these trespassers in their wrongful withholding of the possession of the land in question, the Court should force the United States, without its consent and against its will, to resume the title and right of possession to lands which it sold and conveyed so long ago; and this too, when it could not itself, however much it might desire to do so, nor however just it might be that it should do so, maintain any action or proceeding in its own name or on its own behalf for that purpose, because of the bar created by section 8 of the Act of March 3rd, 1891. (26 Stat. at Large 1093, ch. 561.)

We know, of course, that the fact that the pleader has asked, in his prayer for judgment, for relief to which the facts pleaded do not entitle him, is no ground for refusing to grant him such relief, as under the law, the facts pleaded and proved entitle him to. But he could, under the general denial in his answer, not only put the Plaintiff to proof of its title or right of possession, as above pointed out, but he could also

prove any fact, which showed that the patent to Ellis was not merely voidable, but was void, so that it passed no title from the United States, and by that means defeat the Paintiff, without setting out in the answer the facts showing such patent to be void. So that in any view which can be taken of the question, even if the Court on this writ of error has jurisdiction to look into it, the Circuit Court was right in striking out the amended answer and the second amended answer.

As to the order striking out parts of the original answer, we shall not occupy time to consider it. It cannot be claimed that it presents any question which gives this Court jurisdiction to review it under the present writ of error.

As still further illustrating the extraordinary views of the law displayed on the part of the Plaintiffs in Error in this case, it may be observed, what the Court, however, cannot know judicially without examining the so-called bill of exceptions, that notwithstanding the patenting of the lands in question to Ellis, April 16th, 1838, and the fact that they are part of the City of Milwaukee, occupied and built upon, as stated above, and were not subject to pre-emption, even if the right of pre-emption still existed, (see section 2258 R. S.), they sought, at the trial, to be permitted to prove, that on March 17th, 1897, more than six years after the pre-emption laws were repealed by section 3 of the Act of March 3rd, 1891, (ch. 561), one F. W. Tamms, claiming to reside on lot 2 and to have, since on or about June 5th or 6th, 1888, with other persons, settled and improved said lots 1 and 2, made application at the local Land Office of the United States at Wausau, Wisconsin, to pre-empt for himself and all other persons then living thereon the two lots in question. That such application was rejected; that Tamms had appealed from such rejection to the Commissioner of the General Land Office; that the ruling of the local Land Office was affirmed by the Commissioner; that an appeal had been taken from the ruling of the Commissioner to the Secretary of the Interior, and that that appeal was still pending and undeter-

mined. All of which offers were, of course, rejected by the Circuit Court.

We respectfully submit, that this Court is, for the reasons hereinbefore stated, without jurisdiction to review, under this writ of error, any question which arises or has arisen in this case, and that the writ of error should be dismissed.

WILLIAM E. CARTER,

Of Van Dyke & Van Dyke & Carter, Attorneys for Defendant in Error.

ELBERT H. GARY,

General Counsel, Illinois Steel Company,

Of Counsel.

Supreme Court of the United States.

OCTOBER TERM. 1897.

No. 560.

JOHN BUDZISZ AND AUGUST BUDZISZ ALIAS ANASTASIUS BUDZISZ, PLAINTIFFS IN ERROR,

vs.

ILLINOIS STEEL COMPANY, DEFENDANT IN ERROR.

ARGUMENT OF PLAINTIFFS IN ERROR.

Upon the motion to dismiss the writ of error in the case of John Budzisz et al. vs. Illinois Steel Company, made by the Illinois Steel Company, the plaintiffs in error desire to call to the attention of the Court the following reasons why the motion should be denied.

Some of the facts pleaded in the answer, both as matters of defense and counterclaim, as well as portions of the prayer for relief, were the following:

13 That the defendants are informed and verily believe that the Indian title to Lot One (1) of Fractional Section Eight (8), Township Twenty-two (22) North, Range Twenty (20) East, which contained 41.80 acres, and a joint entry of which was made by the said Increase Claflin and Daniel Darnell on the 30th day of July, 1835, at the Green Bay, Michigan Territory, Local United States Land Office, was not extinguished on the 29th of May, 1830, and upon that day was in the Indians; and that the Indian title to the aforesaid Lot One (1) of Fractional Section Eight (8), Township Twenty-two (22)
14 North, Range Twenty (20) East, with other lands, was conveyed, as the defendants are informed and verily believe, to the United States under and by virtue of several treaties with the Menomonee tribe of Indians, as follows, to-wit:

* * * * * * * * * *

16 That your defendants are informed and verily believe that thereafter a treaty was made, and dated on the 18th day of October, 1848, between the United States and the Menomonee tribe of Indians whereby, among other things, "the said Menomonee tribe of Indians agree to cede and do hereby cede, sell and relinquish to the United States all their lands in the State of Wisconsin, wherever situated," and which treaty was duly ratified on the 23d of January, 1849.

That the defendants are informed and verily believe that under and by virtue of the sixth subdivision of the aforesaid treaty of the 8th day of February, 1831, "the

Menomonee tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox River and Green Bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly."

* * * * * * * * * *

That the defendants are informed and verily believe that for the same reason the patent of the United States dated the 1st day of September, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell, for the said Lot Number One (1) of Fractional Section Eight (8), in Township Twenty-two (22) North, of Range Twenty (20) East, in the district of land subject to sale at Green Bay, was and is null and void.

* * * * * * * * * *

That the defendants are informed and verily believe that the patent of the United States dated the 16th day of April, 1838, to Albert G. Ellis, assignee of Daniel Darnell, based upon pre-emption float Certificate No. 2, Green Bay Series, under and by virtue of the laws of the United States and the aforesaid treaties herein set forth, was and is null and void, and in no way extinguished the title of the Government of the United States to the aforesaid Lots numbered One (1) and Two (2) of Fractional Section Thirty-three (33), Township Seven (7) North, Range Twenty-two (22) East.

* * * * * * * * * *

Wherefore, the defendants ask and demand that the aforesaid joint entry of Increase Claflin and Daniel Dar-

nell at the United States Land Office at Green Bay, Michigan Territory, on the 30th day of July, 1835, to Lot One (1) of Fractional Section Eight (8), Township Twenty-two (22) North, Range Twenty (20) East, containing 41.80 acres, be declared null and void and can-
27 celed; * * * * * that the pre-emption float entry Number Two (2), made on the 30th day of July, 1835, at the United States Land Office at Green Bay, Michigan Territory, by the aforesaid Daniel Darnell, to Lots One (1) and Two (2) of said Fractional Section
28 Thirty-three (33), Township Seven (7) North, Range Twenty-two (22) East, be declared null and void and canceled.

* * * * * * * * * * *

And further, the defendants ask and demand that the complaint of the plaintiff herein be dismissed with costs.

RUBLEE A. COLE,
Attorney for Defendants.

Both the construction and the validity of treaties of the United States, made under its authority, are involved, and arise, and are drawn in question in this case.

The Supreme Court of the United States, in the case of Worcester vs. Georgia, 6 Peters, 515, 540, in the opinion by Chief Justice Marshall, declares:

"This plea was overruled by the Court, and the prisoner, being arraigned, pleaded not guilty. The jury found a verdict against him, and the Court sentenced him to hard labor in the penitentiary for the term of four years.

"By overruling this plea, the Court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the 'Act to establish the judicial courts of the United States.'

"The plea avers that the residence charged in the indictment was under the authority of the President of the United States, and with the permission and approval of the Cherokee Nation. That the treaties subsisting between the United States and the Cherokees acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void.

* * * * * * * * * *

"Let the averments of this plea be compared with the twenty-fifth section of the judicial act. * * * * 'Where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of,

or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission.'

* * * * * * * * * *

"The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

* * * * * * * * * *

The charters contain passages showing one of their objects to be the civilization of the Indians and their conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich pres-

ents. The English, the French and the Spaniards, were equally competitors for their friendship and their aid. * * * * * (Page 546.)

* * * * * * * * * * *

"There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them." * * * * (Page 551.)

In their answer and throughout all the proceedings in the case, John Budzisz and Anastazius Budzisz asserted rights and invoked the protection of Indian treaties and the laws and constitution of the United States.

From Harcourt vs. Gaillard, 12 Wheaton, 523:

"It is true, that the power of the crown was at that time admitted to be very absolute over the limits of the royal provinces, but there is no reason to believe that it had ever been exercised by any means less solemn and notorious than a public proclamation: and although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory,

was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit by a solemn grant from the crown to the lords proprietors, from whom in fact she had wrested it by a revolution even before the rights of the proprietors had been bought out by the crown.

But this is not the material fact in the case; it is this, that this limit was claimed and asserted by both of those states in the declaration of independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States that they acquired any thing by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle the soil and sovereignty within their acknowledged limits, were as much theirs at the declaration of independence as at this hour."

The United States Supreme Court, in Chotard vs. Pope, 12 Wheaton, 586, declares:

"Under the operation of these words, assuming the right to appropriate any unpatented land in the two states, the complainants have asserted the privilege of entering a tract of land, which covers the site surveyed and laid off for the town of Claiborne, in the State of Alabama. The proper officers have refused to issue the ordinary evidences of title, and have gone on to sell out the town lots, according to law. This bill is filed against the register of the land office, and the purchaser of one of the town lots, to compel them to make titles to complainants.

On behalf of the United States, it is contended that the literal meaning of the terms of the act is limited and restrained by the context, and by considerations arising out of the general system of land laws of the United States, into which this act is ingrafted; and that, so construed, the right granted is limited to that description of lands which are liable to be taken up at private sale." * * * * *

From Missouri, Kansas & Texas Ry. Co. vs. Roberts, 152 U. S., 114, 117, 118:

"The right of the United States to dispose of the fee of land occupied by them (i. e., the Indians), it added, has always been recognized by this Court from the foundation of the government. There are, however, certain well established doctrines controlling the action of the government, which can always be invoked to prevent hasty and improvident action against the Indians. *It has always been held that the occupancy of the lands set apart by statute or treaty with them for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands.*

And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and pre-emption."

The record in this case of Budzisz et al. vs. Illinois Steel Company further discloses the fact that the pretended chain of title of the Illinois Steel Company to the land in controversy in this case comprises as certain links in such chain various tax deeds from Milwaukee County and the City of Milwaukee, which were issued

because of the non-payment of taxes by the persons pretending to claim title under Darnell and under Ellis as assignee of Darnell. Similar exceptions were reserved as to these tax deeds and that the lands were not subject to taxation by reason thereof. In this state of the case, plaintiffs in error insist that there is no privity between the Illinois Steel Company and Darnell; nor between the Illinois Steel Company and Ellis as assignee of Darnell. Hussman vs. Durham, 165 U. S., 144, 147.

As was stated in the case of Hussman vs. Durham, 165 U. S., 144, which was a writ of error to the Supreme Court of the State of Iowa:

"A motion to dismiss was submitted by the defendant in error, but as the Supreme Court of the state held that the equitable title apparently conveyed by the proceedings in the United States Land Office in 1858 was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the authority of the United States was decided, and, therefore, this Court has jurisdiction.

On the merits of the case we remark that while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation, Carroll vs. Safford, 3 How., 441; Witherspoon vs. Duncan, 4 Wall., 210; yet until such equitable title has passed and while the land is still subject to the control of the government it is beyond the reach of the state's power to tax. Railway Company vs. Prescott, 16 Wall., 603; Railway Company vs. McShane, 22 Wall., 444; Tucker vs. Ferguson, 22 Wall., 527, 572; Colorado Company vs. Commissioners, 95 U. S., 259. There-

fore the validity of the tax titles held by plaintiff in error depends upon the question whether the equitable title to the land had passed from the government to Craig."

Hussman vs. Durham, 165 U. S., 144, 147.

The appeals of Holden vs. Joy and Warner vs. Joy, 17 Wallace, 211, are from the Circuit Court of the United States for the District of Kansas, and as well as the case of Warner vs. Joy, 17 Wallace, 253, note, arising on a writ of error to the Circuit Court of the United States to a judgment of that Court in an action for the recovery of land, sustain the jurisdiction of this Court in this case of Budzisz vs. Illinois Steel Company. Clearly the Supreme Court had jurisdiction in these cases prior to the act of March 3, 1891, upon appeal or writ of error, to determine the construction and validity of the Indian treaties therein involved. It is the intention of section 5 of the act of March 3, 1891, that such jurisdiction should still remain in the United States Supreme Court upon a writ of error direct to the Circuit Court of the United States. The validity and construction of the Indian treaties in those cases were drawn in

question substantially in the same manner as in this case.

The case of Holder vs. Aultman, Miller & Company, decided by United States Supreme Court January 10, 1898, is a writ of error to the Circuit Court of the United States for the Eastern District of Michigan, and is authority to uphold the jurisdiction of this Court in this case upon the questions as to the validity and construction of the Indian treaties which were drawn in question in this case and to the vested rights which were also drawn in question in the lower Court.

Mr. Justice Gray, in that case, says:

"The jurisdiction of this Court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the Court below."

In the case of Penn. Mutual Life Insurance Company et al. vs. City of Austin et al., which was decided January 3, 1898, the Court says:

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition, 'that the constitution or a law of the state.' * * * * Of course, the claim must be real and colorable, not fictitious and fraudulent."

* * * * * * * * * *

"The argument, then, in effect, is that the right to a direct appeal to this Court does not exist where it is claimed that a state law violates the constitution of the United States, unless the claim be well founded. But

it can not be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. * * * * * These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. Horner vs. United States, 143 U. S., 571 (36: 267)."

The case of Owings vs. Norwood's Lessee, 5 Cranch, 344, was a writ of error to the Court of appeals of the State of Maryland, in an action of ejectment, and the Court held that: "The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due." And further: "*If Scarth or his heirs had claimed, it would have been a case arising under a treaty.* But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause." The Court did not dismiss the writ of error upon motion but heard the case upon its merits and determined the proper construction of the treaty after such hearing. This is apparent from the case itself, as well as from the statement in regard to it in the case of Crowell vs. Randall, 10 Peters, 368, on page 393, as follows:

"The earliest case is Owings vs. Norwood's Lessee, 5 Cranch, 344. In that case, it clearly appeared that the construction of a treaty was before the State Court; and that it was decided that the right of the party was not protected by the treaty. This Court affirmed the decision of the State Court."

It is very clear that Owings vs. Norwood's Lessee, 5 Cranch, 344, is not in point to authorize the dismissal of the writ of error in this case on motion.

The case of Beecher vs. Wetherby, 95 U. S., 517, cited by defendant in error, upon the argument in behalf of its motion to dismiss the writ of error herein, does not seem to be in point in this case either upon the question of the treaties or upon the jurisdiction of the Court in any manner to sustain the contention of the defendant in error.

The action of replevin in that case in the Circuit Court of the United States gave the Court occasion to construe certain laws and treaties of the United States with the Menomonee nation of Indians. The lands, from which the timber was cut, were in the county of Shewano, Wisconsin, *north and west of the Fox River*. Certain questions which arise in this case could not, in any way, have arisen in Beecher vs. Wetherby; or, if they could have arisen, were, in fact, not raised. The case arose prior to the act of March 3, 1891, establishing the Court of Appeals and defining the jurisdiction of that Court and of the Supreme Court. The Supreme Court on writ of error prior to act of March 3, 1891, had jurisdiction of the case; and had the case arisen since that act, instead of prior to it, it is believed the United States Supreme Court would have had jurisdiction of it on writ of error. The plaintiff in the case of Beecher vs. Wetherby, although relying upon patents of the United States, did not recover in either the lower Court or in the United States Supreme Court, which clearly indicates that a patent of the United States is not "invulnerable," as charged by Judge Seaman in this case.

The lower court *would not permit the defendants, under the general denial in their answer*, to put the plaintiff to proof of its title or right of possession; nor would the Court permit the defendants to prove any of the facts set up in their answer.

Two of the errors assigned are:

33. The Court erred in using the following language in the charge to the jury: "He entered a little less than six years ago upon this property, put up his shanty as a squatter, as an intruder, as the law names it, without any right or claim."

37. The Court erred in using the following language in the charge to the jury: "Aside from that a patent from the government is invulnerable."

The bill of exceptions which is contained in the record is a truthful record of the proceedings in the Circuit Court. Such bill of exceptions actually has the signature of the judge to the same authenticating the truth and accuracy of the bill. All oral testimony, substantially, was received against objections or subsequently moved to be stricken out. The bill of exceptions in this case was presented to the Court some days before it was finally signed as appears from the signed endorsement of the judge in his proper handwriting on the cover of the same. The bill of exceptions in this case is in proper form; and sufficient both as to form and authentication under the rule indicated by the United States Supreme Court in the case of Lees vs. United States, 150 U. S., 476, wherein the Court say, page 482:

"But whatever of force there is in this implication is overborne by the statement in the last sentence of what the judge did. By his signature and seal he authenticated the bill of exceptions, as prepared and presented to him. And all the facts and matters stated in that bill are by such authentication brought into the record for all purposes for which they may legitimately be used."

If the transcript of the proceedings in the Circuit Court authenticated by the signature of the judge is not a bill of exceptions, it must be a sufficient certificate of a question of jurisdiction. The record shows that such a question of the jurisdiction of the Circuit Court arose in that Court and that a certificate of a question of jurisdiction was requested. No particular form of certificate is essential.

United States vs. Jahn, 155 U. S., 109, 112, 113.
New Orleans vs. Benjamin, 152 U. S., 411.
McLish vs. Raff, 141 U. S., 661.

If the contention of the Illinois Steel Company is correct and if the float entry of Darnell was valid and the patent to Ellis as assignee of Darnell is valid and if the partition proceedings in 1846 are valid, then there is a vested right in John Budzisz and Anastazius Budzisz to the lands in controversy. This claim was made in the lower Court.

City of Cincinnati vs. Lessees of White, 6 Peters, 434.
Green vs. City of Tacoma et al., 51 Fed. Rep., 622, 623.

Among others things the decree of partition, which was dated July 9, 1846, declared:

"And it is further ordered, adjudged and decreed that the said several parties and their heirs and assigns shall have a perpetual right of way and easement on the streets and alleys on said premises as laid out and designated on said map hereto annexed.

By the Court,

A. G. MILLER."

The Steel Company do not have and cannot have an assignment of such right of way and easement and can take nothing under this clause. It is a limitation on the rights of the parties to the decree; and not a reservation.

You can assign a reservation but cannot assign a limitation to the rights of parties to a decree.

The decree by its express limitation negatived any greater rights in the dedicators of said street; and the municipality of Milwaukee was in existence to take the grant for the public.

Cincinnati vs. White, 6 Peters, 431, see p. 439.

There was no reversion in the decree in the partition suit as to the street for the benefit of any of the parties to such suit. As was said in Robertson vs. Pickrell, 109 U. S., 608, as to a conveyance of a life estate by a deed without covenants or recitals as to any further interests of the grantors or of others:

"There is nothing in the nature of the estate which necessarily implies that the grantor is the owner of the reversion. The absence in the deed here of any reference to a reversionary interest would rather seem to negative such ownership."

Under the decree in partition there was an express dedication of the street to the public. At common law the legal title would have passed to the municipality and the equitable title to the public. Such a trust at common law would be an express trust. Under our statute of uses and trusts, the legal title passes to the public; and the legal and equitable title unite. This is a trust arising or resulting by implication of law

(Sec. 2076, R. S. Wis., 1878), valid as such in its creation, and vests the whole estate in the trustee (the municipality),subject only to the execution of the trust; and the public for whose benefit the trust was created takes no estate or interest in the lands, but may enforce the performance of the trust.

Sec. 2086, R. S. Wis., 1878.

The dedication to the city being a grant without limitations, there can be no contingent remainder. This is so because the public have a vested right in the street and have a perpetual right to enforce the trust.

Sec. 2086, R. S. Wis., 1878.

This street differs entirely from a street laid out under statutes where the public has a mere easement; and where under such statutes the title remains in the abutting owner.

Paine Lumber Co. vs. Oshkosh, 89 Wis., 449.

89 Wis., 449, is distinguished in 92 Wis., 118, p. 121.

The Supreme Court of Wisconsin and the Supreme Court of the United States both have held that a mortgagor out of possession cannot bring ejectment against a mortgagee in possession after condition broken. This is so because the mortgagor has only an equitable title.

Probst vs Brock, 10 Wallace, 519, 530, et seq.

Bryan vs. Brasius, 162 U. S., 415.

Bryan vs. Kales, 162 U. S., 111.

The mortgagor is not entitled to the possession except upon a contingency—(i. e. that he can get in).

The Illinois Steel Company is not in as favorable a position as a mortgagor out of possession with his mortgagee in possession after condition broken.

Section 3074, R. S., as to ejectment. Plaintiff must show title and right of possession at commencement of action.

Ejectment cannot be maintained by the holder of the equity of redemption against the mortgagee or his assigns lawfully in possession.

Gillett vs. Eaton, 6 Wis., 30.
Tallman vs. Ely, 6 Wis., 244.
Stark vs. Brown, 12 Wis., 572.
Hennesy vs. Farrell, 20 Wis., 42.
Scheiber vs. Casey, 48 Wis., 208, p. 214.

Nor by cestui que trust or other person having only equitable interest.

Gillett vs. Treganza, 13 Wis., 472.
Eaton vs. Smith, 19 Wis., 537.
Kinney vs. Dexter, 81 Wis., 80, p. 81.

In conclusion, in respect to section 8 of chapter 561 of the Laws of 1891 (Act of March 3, 1891), (Vol. 26, Stat. at Large, 1099), to the effect as follows:

Sec. 8. THAT SUITS BY THE UNITED STATES TO VACATE AND ANNUL ANY PATENT HERETOFORE ISSUED SHALL ONLY BE BROUGHT WITHIN FIVE YEARS FROM THE PASSAGE OF THIS ACT, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

A somewhat similar point arose in case of Lindsey et al. vs. Lessee of Miller, 6 Peters, 666, wherein the Court, among other things said:

"The entry and survey of the defendants were made before the deed of cession; * * * * *."

In the case of Goodtitle, Lessee of Parker, against Baldwin, 11 East's Reports, 488, upon a motion to set aside a verdict in ejectment for the defendant and for a new trial, Lord Ellenborough, C. J., said:

"No grant from the crown can be presumed, against the express provision of the Stat., 20 Car., 2, to have been made to the lessor's father in his life time; and unless it had been competent to the crown to make such a grant, how can the lessor of the plaintiff who claims under his father, and who has been out of possession since his father's death, have any title? No grant can be presumed in his favor. * * * * * * * * * * * * * * * * ; *and the lessor of the plaintiff must recover against the defendant by the strength of his own title, and not by the weakness of the defendant's* title; and the Stat., 20 Car., 2, bars any presumption of title in favor of the lessor in this case."

In the foregoing case the lessor of the plaintiff relied upon the statute of the 9 Geo., 3, c. 16, which is

similar to Sec. 8, Act of March 3, 1891 (Vol. 26, Stat. at Large, 1099), which the English Court holds "does not give a title."

An entry of lands which are legally reserved for other purposes is clearly void and the United States continues to hold the land "as if no entry had been made."

McCarthy vs. Mann, 19 Wallace 20, 32.

Thus the entry of Daniel Darnell of lots one (1) and two (2) of fractional section thirty- three (33), township seven (7) north, range twenty-two (22) east, to which the Indian title either was not extinguished or which land was reserved under the terms of Indian treaties for Indian occupancy, was clearly void, and "the United States held the land as if no entry had been made."

McCarthy vs. Mann, 19 Wallace 20, 32.

Thus the assignment by Daniel Darnell of the floating right entry to said land to A. G. Ellis was clearly void as were all deeds signed and executed by Ellis to any of the land included in his patent as assignee of Darnell of fractional section thirty- three (33), township seven (7) north, range twenty-two (22) east. Reference to the description in the patent will disclose that lots one (1) and two (2) are not mentioned in the patent, but the description in the patent is, as follows:

" * * * for fractional section thirty- three in township seven north, of range twenty-two east, in the district of lands subject to sale at Green Bay, Wisconsin Territory, containing seventy-seven acres and seventy hundreths of an acre, * * *."

Under the exceptions taken to the reception of the patent to Ellis as assignee of Daniel Darnell and to the reception of the receiver's certificate and receipt as to the assignment thereof by Daniel Darnell to Ellis, the defendants in the Circuit Court claimed that the various Indian treaties relied upon by them are a part of the law of the land and that by such treaties they were protected and that they claimed thereunder that it was the duty of the Circuit Court in each instance to exclude such evidence as under the law of the land the Court was bound to know and to hold that at the date of each and all and every of such instruments the land in question was either reserved for the occupancy of Indians or was in the occupancy of the Indians both by virtue of the original right and also by virtue of the guarantee of several treaties with the United States; and that each and all and every of such instruments was therefore void as distinguished from voidable and not entitled to be admitted in evidence.

Harcourt vs. Gaillard, 12 Wheaton 523, 529.

Lake Superior Ship Canal, Railway and Iron Company vs. Cunningham, 155 U. S., 354, pp. 373, 374.

No act was ever passed by Congress ratifying and confirming the Darnell entry or the assignment thereof to Ellis or the patent to Ellis as assignee of Darnell. Such an act for the relief of Poncin and those claiming under him, in the case of McCarthy vs. Mann, 19 Wallace, 20, was passed by Congress, and the validity of the entry and title of Poncin and the validity of the title of those claiming under Poncin depended wholly

upon such act of confirmation and ratification which was in effect a congressional grant. As was said in that case on page 32:

"The first entry by Poncin was clearly void, and the commissioner was right in setting it aside. *When the act in question was passed, the United States held the land as if no entry had been made. Being the absolute owners, they could grant it upon such terms and conditions as Congress might prescribe. The government united the powers of ownership and legislation, and both were exercised in passing the act.* The act declared, first, that the entry should be reinstated as of its original date, and that a patent should issue to Poncin; second, that the title should enure to the benefit of his grantees as he should have conveyed the land. *The law is explicit and there is no difficulty in carrying out its provisions. It must be liberally construed to effect the purposes of its enactment.* By Poncin's grantees was meant those claiming title under him. Those to whom he might have conveyed were no more intended to be beneficiaries under the act, than those holding remoter links in the same chain of title. When he paid his money and procured a certificate of entry pursuant to the act, an equity vested in each of those who would have held it, *if the original entry had been valid*, and when the patent issued, the legal title vested in the same parties. The act applied the doctrine of relation. It made no distinction between grantees with warranty and those without it. If there had been outstanding title bonds, they also would have been within the equity of the act, and the holders could have enforced them accordingly."

McCarthy vs. Mann, 19 Wallace, 20, 32.

The defendants in the lower Court having claimed that neither the equitable nor legal title ever passed to Daniel Darnell or to Ellis as assignee of Daniel Darnell nor to any one claiming under them because of the Indian treaties, further, upon the same ground, reserved exceptions that the lands were not subject to taxation by the city, county or state and that the tax deeds were void, under the laws and Constitution of the United States and should not be admitted in evidence. Such tax deeds were, however, admitted. This is an additional reason why the writ of error herein should not be dismissed.

John Budzisz and Anastazius Budzisz claim under the United States and are attempting to acquire title from the United States. The notice to quit was served upon them by the Illinois Steel Company in January, 1896.

The description in the patent is too indefinite to devest the fee. A portion of Fractional Section Thirty-three is East of the middle of the Milwaukee River which was the boundary of the Menomonee tribe; and the remaining portion is West of the middle of the Milwaukee River, which was the boundary, as defined in

the treaty at Prairie des Chiens in 1826, of the United Nation of Chippewa, Ottawa and Pottawatamie Indians.

Fractional Section Thirty-three (33) of Township Seven (7) North, Range Twenty-two (22) East, legally surveyed, did comprise more than seventy-seven acres and seventy hundreths of an acre.

The granting clause of the patent can not be limited by the words "containing seventy-seven acres and seventy hundreths of an acre."

Crown grants are construed strictly, and the introduction in a patent of general words of reference to a prior grant of the subject matter to the crown (i. e., in tam amplo modo as the grantor to the crown had it), will not extend the operation of a crown grant beyond the precise terms of the patent.

Rex vs. Copper, 5 Price, 217-268. (8. C., 19 R. R., 568.)

Where the operative words of a deed are clear and unambiguous, their meaning can not be altered by inference, from the recital, of a different intention.

Walsh vs. Trevanion, 19 L. J. Q. B., 458 (8. C. 15, Q. B. Ad. & El. (N. S.), 733).

Patterson, J., in Williams vs. Morgan, 15 Adolphus & Ellis, N. S., 782, 788, 789, said:

"* * * * * It might be necessary to show how it came that he who was at law leaseholder for a term of years ceased to pay any rent, or the like, which might be explained by proving that he had become in equity entitled to the fee."

From Polk's Lessee vs. Wendal et al., 9 Cranch, 87:

"The fact that this title occurred before the cession does not appear on the face of the grant. It is, of course, open to examination."

The Indian title was not legally extinguished on the 29th of May, 1830, nor on the 19th of June, 1834, nor at the date of the issuance of the patent in a sense which authorized the United States to grant the land.

From Fulton vs. M'Affee, 16 Peters, 149:

"From this statement of the case, it will appear, that the only right drawn in question was that claimed by M'Affee under his certificate. If that certificate was a good legal title, it was elder, and therefore superior, to the legal title *derived under the patents produced by the defendants.*"

From Clark vs. Smith, 13 Peters, 195:

"The ultimate fee (incumbered with the Indian right of occupancy) was in the crown previous to the revolution, and in the states of the Union afterwards, and subject to grant."

John Budzisz and Anastazius Budzisz claim under the United States and are attempting to acquire title from the United States. The notice to quit was served upon them by the Illinois Steel Company in January, 1896.

Upon the conclusion of the plaintiff's testimony in the Circuit Court, in behalf of the defendants, the counsel for the defendants made the following motion:

"Defendants' Counsel: I desire at this time to state that the defendants rely in this Court upon, and rest upon, several treaties of the United States with the Menominee tribe of Indians, as follows, to-wit:

The purported treaty of the date of the 8th February, 1831, and the supplemental article thereto dated February 17th, 1831, which were conditionally ratified by the Senate of the United States the 25th day of June, 1832, and the provisional ratifications thereof signed by the President of the United States on the 9th day of July, 1832;

And the purported treaty with the Menominee Indians dated 27th October, 1832, which was ratified by the Senate of the United States by the resolutions of said Senate on the 2d day of March, 1833; and such ratification, with the advice and consent of the Senate, signed by the President of the United States on the 13th day of March, 1833;

And also upon a certain treaty made by the United States, with and by and between the United States and the Menominee tribe of Indians, dated the 18th day of October, 1848; and which treaty was duly ratified on the 23d of January, 1849;

And also upon a treaty made at Chicago, in the State of Illinois, on the 26th day of September, A. D. 1833, between the United States and the United Nation of Chippewa, Ottawa and Pottawattamie Indians, and the articles supplementary thereto; and which said treaty was ratified by the Senate of the United States by two resolutions, one dated the 22d day of May, 1834, and the other the 11th day of February, 1835, and which treaty was proclaimed February 21, 1835; and relying on the same, the defendants move to strike out all the testimony introduced by the plaintiff herein.

Motion denied and the defendants except."

In Balls vs. Westwood, 2 Campbell's Reports, 11, Lord Ellenborough said:

"Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now inquire into the validity of the seizure, and consider who is legally entitled to the premises; but the same tenancy continues which was created by the original demise, and the tenant must still pay rent to the lessor whose title he then recognized."

"Upon like grounds the jurisdiction of this Court to re-examine the final judgment of a state Court can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such Court intended to assert a federal right."

F. G. Oxley Stave Co. vs. Butler County, 166 U. S., 648, 655.

Such a conception of the language of the treaty is incorrect. Such provision is a reservation and not a grant. The Indians always had the right to hunt and fish, until they should cede it.

The contention is that the treaty of February 8, 1831, and the supplemental articles thereto, never became binding upon the Menomonees until the treaty of 1848 with the Menomonees was ratified and proclaimed.

The agreement of October 22d, 1832, proclaimed as a treaty March 13th, 1833, arranged by Gov. Porter with the Menomonees, was not a treaty, because Gov. Porter was only authorized to obtain the best terms upon which the Menomonees would ratify the treaty of February 8th, 1831; as only the President of the United States has power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. (Sec. 2; Article 2; Cons. U. S.)

The letter of Hon. Lewis Cass, Secretary of War, to Gov. Porter, containing his instructions as to the conference at Green Bay with the Menomonee Indians, is filed with this argument.

The reservation to the Indians east of the Fox River and Green Bay by the terms of the treaty at its earliest date possible under the treaties was not extinguished until May 6th, 1835, IF THEN.

In the case of United States vs. Fitzgerald, 15 Peters, 407, the Court said:

"The first section of the act of the 19th of June, 1834, gives to every settler or occupant of the public lands, prior to the passage of that act, who was then in that possession and cultivated any part thereof in the year 1833, all the benefits and privileges provided by the act, entitled 'An act to grant pre-emption rights to settlers on the public lands,' approved the 29th of May, 1830, and which act was thereby revived. THE RESERVATION AND APPROPRIATION MENTIONED IN THE ACT OF THE 29TH OF MAY, 1830, MUST HAVE BEEN VALID AND SUBSISTING

AT THE DATE OF THE ACT OF THE 19TH OF JUNE, 1834, TO DEPRIVE THE DEFENDANTS OF THEIR RIGHT OF PREEMPTION."

The reservation to the Indians under the Menomonee treaties was valid and subsisting on the 19th of June, 1834; and neither Daniel Darnell nor Increase Claflin could be a legal settler or occupant.

Further in the case of Stark vs. Starr, 73 U. S. (6 Wall.), 402, among other things, the Court say:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

If this be so and Daniel Darnell and Increase Claflin had no right to a patent and the land officers were without jurisdiction to give them such a patent, their purported patent is void.

That there may be a void patent as distinguished from a voidable one is clearly indicated by the United States Supreme Court in the case of Hughes vs. United States, 4 Wallace, 232, wherein the Court say:

"It was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress."

The fact that the issuing of a patent *was without authority, or was prohibited by statute*, can be raised in an action of this character, and the pleading of the lack of authority and the prohibition can not prejudice plaintiff. Again the pleading nowhere alleges fraud,

irregularity or mistake—but want of authority and action not authorized but prohibited by statutes, reservations and treaties.

Their patent is void. The officers of the land department, both local and general, were without authority or jurisdiction in the premises and their acts are ABSOLUTELY VOID.

"Whereby it appears that full payment has been made by the said Daniel Darnell according to the provisions of the act of Congress of the 24th of April, 1820."

* * * * *

It is apparent that the document on its face shows it is untrue and must be read in connection with the laws of the 29th of May, 1830, and the 19th of June, 1834; and in connection with the other laws and treaties relating thereto.

The matter in the answer which was stricken out by the Court was pleaded for the express purpose of alleging that the patent at the time of its execution was, and now is, absolutely void.

In Montgomery vs. Hernandez, 12 Wheaton, 129, the Court further took jurisdiction as to part of the case, though affirming the action of the state Court thereon,

and, among other things, upon this subject stated: "The only part of the case over which we can rightfully exercise appellate jurisdiction, is that raised by the supplemental answer."

In Fulton vs. M'Affee, 16 Peters, 149, the Court stated:

"* * * * * They were intended, therefore, with other evidence, to prove that this certificate was fraudulently and improperly obtained; that its authority had been denied by the commissioner of the general land office; and consequently, that it did not confer on the lessor of the plaintiff a valid legal title, upon which he could recover in ejectment."

Both the original entry in July, 1835, and the patent to Ellis as assignee of Darnell in 1838 at their dates and inception, respectively, were void and are void as distinguishable from voidable if the contention and claims of the plaintiffs in error are correct.

From Johnson vs. McIntosh, 8 Wheaton, 543:

"No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

* * * * * * * * * *

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578,

authorizes him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

* * * * * * * * * *

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves, and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

* * * * * * * * * *

The King, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

* * * * * * * * * *

After these states became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

* * * * * * * * * *

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognize and elucidate the principle

which has been received as the foundation of all European title in America.

* * * * * * * * * *

Public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

* * * * * * * * * *

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts.

* * * * * * * * * *

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant made by those Indians to the colony; on the nature and extent of the reservations made by the Indians, in their several deeds and treaties, which were alleged to be recognized by the legitimate authority; and on the violation, by the colony, of rights thus reserved and secured. We do not perceive, in that case,

any assertion of the principle, that individuals might obtain a complete and valid title from the Indians.

* * * * * * * * * *

Much reliance has also been placed on a recital contained in the charter of Rhode Island, and on a letter addressed to the governors of the neighboring colonies, by the King's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

* * * * * * * * * *

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced, when considered in connection with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissensions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlements of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and

no power existed in America which could rightfully interfere with it.

* * * * * * * * * *"

Johnson vs. McIntosh, 8 Wheaton.

The Court must take judicial notice of the letter of Hon. Lewis Cass, then Secretary of War, to Gov. George B. Porter of Michigan, containing the instructions in reference to his conference with the Menomonies at Green Bay, and of what Secretary Cass states.

In the case of Hickie vs. Starke, 1 Peters, 94, the Court say:

"* * * * The plaintiffs produce a grant, legally and fully executed; but, to bring the case under the treaty, they must also prove that the ancestor or person under whom they claim was an actual settler on the 27th October, 1795." * * * *

As is stated in *Spalding vs. Chandler*, 160 U. S., 394, on pages 406 and 407:

"Whatever the reason, however, for the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of

1820, even against the consent of the Indians, party to that treaty, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the state for canal purposes. Missouri, Kansas & Texas Railway vs. Roberts, *supra*, 116-117."

As is held in Spalding vs. Chandler, 160 U. S., 394, the mere executive officers of the government can not patent or make valid grants of land while such lands are subject to Indian rights of occupancy.

"In the case of Martin vs. Hunter's Lessee (1 Wheat., 304, 361), an exception was taken to the return of the refusal of the state Court to enter a prior judgment of reversal by this Court, because it was not made by the judge of the state Court to which the writ was directed; but the exception was overruled, and the return was held sufficient."

Worcester vs. Georgia, 6 Peters, 515, 539, 540:

"Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, as above recited; also, that the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control, the intercourse with the said Cherokee nation, which, by

the said constitution, belongs exclusively to the Congress of the United States." * * * * [Page 540.]

Upon the nature of the Indian title to lands in this country, as stated by Mr. Justice Clifford in the case of Holden vs. Joy, 17 Wallace, 211 (L. Ed. 21: 534), as follows:

"Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages and customs. Guided by nautical skill, enterprising navigators were conducted to the New World. They found it, says Marshall, Ch. J., in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing. Expeditions were fitted out by all the great maritime powers of the Old World, and they visited many parts of the newly discovered continent, and each made claim to such part of the country as they visited. Dis-

putes arose and conflicts were in prospect. * * * *It gave the exclusive rigt to purchase, but did not found that right on a denial of the right of the possessor to sell.* Colonies were planted by Great Britain, and the United States, by virtue of the Revolution and the Treaty of Peace, succeeded to the extent therein provided to all the claims of that government, both political and territorial. Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemorial, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed. They could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive pre-emption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands.

Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held * * * * under their original title." * * * *

Holden vs. Joy is a good authority to uphold the jurisdiction of this Court. It also declares the necessity of a ratification or confirmation of void grants and ratification or confirmation by all parties in some form of a treaty which for any reason was not validly made and ratified.

Holden vs. Joy, 17 Wallace on pages 251 and 252.

Worcester vs. Georgia, 6 Peters, 515, is followed, historically, as to policy of government in making, and the result of, treaties between the United States and the Indians.

In respect to the power to make treaties, Mr. Justice Clifford in the case of Holden vs. Joy, 17 Wallace, 211 (L. Ed. 21: 534), said:

"Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur and, inasmuch as the power is given in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the states and the United States. Holmes vs. Jennison, 14 Pet., 569; 1 Kent, Com., 166; 2 Story, Const., Sec. 1508; 7 Hamilton's Works, 501; Duer, Jur., 229."

Further from same case (L. Ed. 21: 535), in regard to issuance of a patent provided for by terms of a treaty:

"Suppose that is so, still it insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the

consent of Congress, which can not be admitted. U. S. vs. Brooks, 10 How., 442; Meigs vs. McClung, 9 Cranch, 11. On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political. Wilson vs. Wall, 6 Wall., 89 (73 U. S., XVIII., 729); Ins. Co. vs. Canter, 1 Pet., 542; Doe vs. Wilson, 23 How., 461 (64 U. S., XVI., 585); Mitchell vs. U. S., 9 Pet., 749; U. S. vs. Brooks, 10 How., 460; Kansas Indians, 5 Wall., 737 (72 U. S., XVIII., 667); 2 Story, Const., Sec. 1508; Foster vs. Neilson, 2 Pet., 253; Crews vs. Burcham, 1 Black, 356 (66 U. S., XVII., 92); Worcester vs. Ga., 6 Pet., 562; Blair vs. Pathkiller, 2 Yerg., 407; Harris vs. Barnett, 4 Blackf., 369."

Section 1 of Chapter 215, Laws of Wisconsin for 1895, as amended by Section one (1) of Chapter 183, Laws of 1897, reads as follows:

"Section 1. No appeal shall hereafter be taken to the Supreme Court in any case from any judgment when the amount involved, exclusive of costs, is less

than one hundred dollars, unless the title to lands shall therein be in question, or the judge of the Court in which such judgment was rendered shall certify that the case necessarily involves the decision of some question or point of law of such doubt and difficulty as to require a decision of the same by the Supreme Court, or that it necessarily involves the construction or interpretation of some provision of the constitution of the United States, or of the constitution of this state; and in all cases the question or questions so certified shall be briefly and clearly stated by such judge, and on the appeal no other question shall be considered or decided."

Here in this "Jones Island" case, the answer sets forth matters with respect to which a patent can be collaterally impeached. The plaintiff is not injured by the pleading of these, the defendants have the right to attempt to prove these (not to contradict the records of the land department because the records thereof prove the facts pleaded); but in order to show the absolute lack of jurisdiction of the officers of the department to issue such a patent and that it is void. The plaintiff has no right of possession under a void patent. That is

a good defense. This Court on a motion to strike out can not assume that the defendants are trespassers as asked by plaintiff's counsel. There is no such state of facts before the Court. By no process of legal construction has the Court any right on the pleadings on a motion to strike out to assume such a fact. The defendants need not plead why they are in possession, they are in possession and that is a matter between them and the United States, if their contention is correct. Further it is a matter of proof in defense. The plaintiff, which is in Court merely because by a legal fiction its existence and legality can not be collaterally attacked, can not well ask to be put into possession of property, it does not own, upon a void patent. The facts are pleaded as one has a right to plead them under the Wisconsin statutes and Wisconsin decisions; and the plaintiff has no good reason to have the same stricken out on a motion. This is so regardless of what the Court might do upon the introduction of all evidence and the determination of the exact status of all the parties. It was never intended to try law suits on motions to strike out.

The Wisconsin cases and statutes are believed to sustain this contention.

Pennoyer vs. Allen, 50 Wis., 308, 310.

Weld et al. vs. The Johnson Manufacturing Company, 86 Wis., 552, 562.

Dobbs vs. Kellogg, 53 Wis., 448, 451, 452.

Brown vs. Cohn, 88 Wis., 627, 634.

Sec. 3078, Vol. 2, page 1764, Sanborn & Berryman's Annotated Statutes of Wis.

See page 356, Vol. 1, Boone on Code Pleading, par. 185.

Section 2657 R. S. Wis., page 1540, Vol. 2, S. & B. Ann. St. Wis.
Lombard vs. Cowham, 34 Wis., 486, 493.

The case of United States vs. Schurtz, 102 U. S., 378, seems to me clearly distinguishable from these "Jones Island" cases and not in point. *The land was subject to entry in that case under existing laws* and the controversy involved was an application by corporate authorities of the city of Granville to cancel the McBride's entry and such application was made before the local land officers some time prior to the issuance of the patents. In respect to the issuance of the patent before final determination of the appeals, the Court points out the remedy. It seems to me that the points we rely upon in the Jones Island cases come within the exceptions as to the binding character of the acts of the officers of the land offices.

It is further significant upon the question of entry that, under the rule of Quinly vs. Conlan, 104 U. S., 420, neither the Illinois Steel Company, Daniel Darnell or any of its supposed (?) predecessors ever made a valid entry. The entry and possession of the Islanders (the defendants herein) so far as shown by the pleadings was and is peaceable and equally as valid as that of the defendants in the case of Carter vs. Ruddy, 166 U. S. 493.

It might be well to be kept in mind that the U. S. Supreme Court attached no importance, legal or equitable, in the case of Burfenning vs. Co., 163 U. S., 321, to the fact that the "float" entryman had paid the necessary government price for the land. If the position of the Jones Island defendants in this brief is

correct, then the supposed tax titles of the Illinois Steel Company are waste paper and worthless. The facts pleaded are important in this respect.

Hussman vs. Durham, 165 U. S., 144.

This court cannot hold upon the pleadings that the plaintiff is in constructive possession.

Carter vs. Ruddy, 166 U. S., 493.

From treaty with Menominie and other tribes at Prairie des Chiens, proclaimed February 6, 1826 (p. 155-160, 159, Revision of Indian Treaties):

"Article 10. All the tribes aforesaid acknowledge the general controlling power of the United States, and disclaim all dependence upon, and connection with, any other power. And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided. It being, however, well understood that the reservations * * * * *are not claimed by either of the said tribes.*"

This is a case that involves the construction of the Constitution of the United States.

This Island has been occupied from twenty to thirty years by several of these fishermen. Others have settled from time to time, coming to the Island from different parts of Germany at the solicitations of the first settlers. The Island was a narrow strip of low land, known as "Jones Island", bordered on the west by the Milwaukee river, on the east by Lake Michigan, on the south by the plant of the Illinois Steel Company and on the north by the new outlet of the Milwaukee harbor. The old outlet of the Milwaukee harbor was between this land and the plant of the Illinois Steel Company, which outlet was gradually filled in by washings from the lake and by the work of these people in filling in with stones, ashes, barrels and soil procured from elsewhere in the city. The part known as "Jones Island" was almost wholly covered by water until some of these people between twenty and thirty years ago began to reclaim it by filling it, protecting it on the lake side with obstructions made of barrels filled with stone, sunk in the ground to prevent the waves from washing the soil away. These barrels gradually retained the soil washed from the lake and other barrels filled with stone were extended further into the lake. The settlers were assisted in reclaiming this land from the lake by the fact that the waters of Lake Michigan have lowered. The land thus reclaimed has been covered by ashes and soil brought in boats from the city. The low land next to the river was reclaimed in the same manner.

Upon this ground the settlers have built their houses and fishing shanties. This fishing business has grown into an industry furnishing the only support for about two hundred families who live on this land.

It is only within a few years that the Illinois Steel Company made any claim to the Island.

Within the last two years the Illinois Steel Company has brought ejectment suits against these settlers. There are now upon the present calendars of the Circuit and Superior Courts of Milwaukee County nearly one hundred and fifty of these cases. In each of these cases the Court has stricken from the answers the allegations corresponding to the ones stricken out by Judge Seaman in the Circuit Court of the United States.

These courts insist that these cases shall be tried the latter part of this month, if called. The cases are likely to be called at that time or during the first week in March.

RUBLEE A. COLE,

Counsel for Plaintiffs in Error.

BUDZISZ *v.* ILLINOIS STEEL COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 560. Submitted February 21, 1898. — Decided April 11, 1898.

No question is presented which brings this case within the supervisory power of this court, as the alleged invalidities of the entries and of the patents do not arise out of any alleged misconstruction or breach of any treaty, but out of the alleged misconduct of the officers of the Land Office; to correct which errors, if they exist, the proper course of the defendants was to have gone to the Circuit Court of Appeals.

THIS was an action of ejectment brought in the Circuit Court of the United States for the Eastern District of Wisconsin, in February, 1896, by the Illinois Steel Company, a corporation of the State of Illinois, against John Budzisz and August Budzisz, citizens of the State of Wisconsin, to recover certain lots or parcels of land in the fifth ward of the city of Milwaukee. The case was so proceeded in that, on November 20, 1897, a final judgment was entered in favor of the plaintiff for possession of the premises, and for costs. A writ of error was then sued out from this court, which the defendant in error moved to dismiss.

Mr. William E. Carter and *Mr. Elbert H. Gary* for the motion.

Mr. Rublee A. Cole opposing.

Mr. Justice Shiras delivered the opinion of the court.

This cause is now before us on a motion to dismiss the writ of error, on the ground that there is not involved any question that brings the case within any of those provisions of the act of March 3, 1891, establishing Circuit Courts of Appeals, which give this court jurisdiction to review the judgment of the Circuit Court. Neither the petition, containing, as it did, only the allegations usual in an action of ejectment, nor the answer, first filed, raised any question which, however disposed of in the Circuit Court, would have enabled either party to have brought the case directly to this court.

Subsequently, however, the defendants filed an amended answer, in which they averred that the title to the land in dispute was still in the United States; that the Indian title to said land had not been extinguished at the time of the inception of plaintiff's title; that any patent or purported patent granted by the United States while the Indian title was still existing was null and void. After, on motion of the plaintiff, certain portions of these answers had been stricken out, the defendants filed a second amended answer, the main allegations of which were as follows:

That the Indian title to the lands in dispute had not been extinguished when Increase Claflin and Daniel Darnell made their entry; that the Indian title was conveyed to the United States under and by virtue of several treaties with the Menominee Indians, to wit: The treaty of February 8, 1831; of February 17, 1831; of October 27, 1832; of October 18, 1848; that by reason of the aforesaid treaties the lands were not subject to entry under the laws of the United States, and that therefore the entry of Claflin and Darnell was null and void; that said lands were first offered for sale by the proclamation of the President on May 6, 1835; that the patent of the United

States dated September 1, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell, was and is null and void; that the patent of the United States dated April 16, 1838, to Albert G. Ellis, assignee of Daniel Darnell, was and is null and void, and in no way extinguished the title of the Government of the United States to the lands in dispute.

On July 30, 1897, the court, on motion of the plaintiff, struck out those portions of the amended answers which have just been enumerated; and on August 3, 1897, the defendants filed exceptions to the orders of the court striking out those portions of the answers, which exceptions were allowed and signed by the judge.

With the record in that condition the case came on for trial, and resulted in a verdict and judgment in favor of the plaintiff.

The record shows no exceptions taken or allowed during the course of the trial, either to the admission or rejection of evidence, or to the charge of the judge. The only bill of exceptions to be found in the record is the one allowed and signed by the judge relating to striking out portions of the answers.

The course most favorable to the plaintiffs in error will be to treat the orders of the court striking out portions of the answers as if they were rejections of offers made at the trial, to prove the allegations contained in the portions stricken out.

The reasons given by the court for striking out those portions of the answers were that a patent of the United States is the highest evidence of title, where the grant originates out of the public domain; that the defendants were mistaken in the inference that the ownership of these lands was at any time, in view of the law, vested in the Indians, or derived through the treaties referred to; that there is no recognition by any of the authorities of a fee vested in the Indians; that as to the land in Wisconsin, the treaty with Great Britain and the cessions of Massachusetts and Virginia are the legal sources of title in the general government; that the treaties with the Indians are regarded only for rights of occupancy and for reservations from sale; that therefore the doctrine is established that the patent issued by the government is "an

invaluable muniment of title and a source of peace and quiet to its possessor;" that even if it be allowed, for the purposes of the motion, that there was no right of entry at the time of original entry alleged, the answer concedes that these lands were offered for sale by the President's proclamation of May 6, 1835, upon the survey of 1834, and that the patents were issued, respectively, April 16 and September 1, 1838; that it is not asserted that their validity has ever been since questioned, either by the United States, or by any person in its right, under equities preëxisting or otherwise; that these lands became patentable after the survey and proclamation, and were clearly within the jurisdiction of the land department when the patents were issued in 1838; that all questions as to entry and right to patent were then determinable by that tribunal, and the patents were not void, even if they were voidable at the instance of proper parties; that the special matters alleged in the answers and included in the motion to strike out state no grounds which are available to these defendants by way of defence; that under the act of Congress of March 3, 1891, c. 559, 26 Stat. 1093, any action by the United States is now barred, and that even if the defendants were possessed of paramount equities, or were in any manner entitled to avail themselves of rights existing in the United States, they are equally barred by that limitation. *Illinois Steel Co.* v. *Budzisz*, 82 Fed. Rep. 160.

The correctness of these views is not before us on this motion to dismiss for want of jurisdiction, and we only state them to show that no question is really presented which brings this case within our supervisory power. It is not claimed that the construction or application of the Constitution was involved, and we think it is quite clear that, in fact, neither the construction nor the validity of any treaty of the United States or made under its authority is in any way involved, or arises, or is drawn in question in this case. Mere allegations to that effect, not based upon the facts of the case, do not create a case which we are authorized to review. The alleged invalidity of the entries and of the patents did not arise out of any alleged misconstruction or breach of any treaty,

but out of the alleged misconduct of the officers of the Land Office in permitting the entries and in issuing the patents; and if any error was committed by the Circuit Court in dealing with that question, which we do not intimate, the proper course for the defendants was to have gone to the Circuit Court of Appeals.

Moreover, the defendants did not connect themselves in any way with the Indian treaties, or with any of the parties to them; nor did they claim any rights under said treaties, or under any of the parties to them. In no true sense, therefore, can it be said that this is a case in which the validity or construction of any treaty made under the authority of the United States is drawn in question by a party having a rightful interest in such question.

The motion of the defendant in error must be allowed, and the writ of error is, accordingly,

Dismissed.